No. 87-5428-CFH
Status: GRANTED

Title: Prentiss Houston, Petitioner
v.
Larry Lack, Warden

Docketed:
September 8, 1987

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Houston,Prentiss

Counsel for respondent: Smith,Gordon W., Smith,Jerry L.

Entry	Date	Note	Proceedings and Orders
1	Sep 8 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Oct 15 1987		DISTRIBUTED. October 30, 1987
4	Oct 23 1987	F	Response requested -- TM.
5	Nov 19 1987		Brief of respondent Larry Lack in opposition filed.
6	Nov 25 1987		REDISTRIBUTED. December 11, 1987
7	Dec 9 1987		Record requested.
8	Dec 21 1987		Record filed.
		*	Certified original record, 5 volumes, received.
9	Dec 30 1987		REDISTRIBUTED. January 15, 1988
11	Jan 19 1988		Petition GRANTED.
			**********
12	Feb 8 1988	G	Motion of petitioner for appointment of counsel filed.
13	Feb 16 1988		DISTRIBUTED. February 19, 1988. (Motion for appointment of counsel).
14	Feb 22 1988		Motion for appointment of counsel GRANTED and it is ordered that Penny J. White, Esq., of Johnson City, Tennessee, is appointed to serve as counsel for the petitioner in this case.
15	Feb 29 1988		Joint appendix filed.
16	Feb 29 1988		Brief of petitioner Prentiss Houston filed.
17	Mar 11 1988		SET FOR ARGUMENT, Wednesday, April 27, 1988. (4th case).
18	Mar 31 1988		CIRCULATED.
20	Mar 31 1988	X	Brief of respondent Larry Lack filed.
19	Apr 1 1988	X	Brief amici curiae of South Dakota, et al. filed.
21	Apr 27 1988		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-5428

IN THE SUPREME COURT
FOR THE UNITED STATES OF AMERICA

PRENTISS HOUSTON	:	
Petitioner	:	
vs.	:	Case No. _____
LARRY LACK, Warden	:	
Respondent	:	

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, by and through his attorney of record, Penny J. White, a member of the bar of the state of Tennessee, who was appointed by order of the Sixth Circuit United States Court of Appeals, respectfully moves this Honorable Court to allow this Petition for Writ of Certiorari to be filed without payment of fees.

The Petitioner appends hereto the order of the Sixth Circuit Court of Appeals appointing counsel, PURSUANT TO CRIMINAL JUSTICE ACT, 1964.

Respectfully Submitted,

Penny J. White

PENNY J. WHITE
Attorney at Law
207 East Unaka Avenue
Johnson City, TN 37601
615-928-6005

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SUPREME COURT, U.S.

43 pp

CASE NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

October 1986 Term

PRENTISS HOUSTON	:
Petitioner	:
vs.	:
LARRY LACK	:
Respondent	:

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Submitted By:

PENNY J. WHITE
Attorney at law
207 East Unaka Avenue
Johnson City, TN 37601
(615) 928-6005

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QUESTION PRESENTED FOR REVIEW

Does a United States Court of Appeals have jurisdiction to hear an appeal from the denial of a state prisoner's pro se application for writ of habeas corpus when the notice of appeal is delivered to prison authorities for mailing three days prior to the due date but arrives at the clerk's office one day after the deadline provided by Rule 4(a) of the Federal Rules of Appellate Procedure?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	1
TABLE OF AUTHORITIES	iii
PRIOR OPINIONS	1
STATEMENT OF JURISDICTIONAL GROUNDS	2
RELEVANT STATUTE AND RULES	3
STATEMENT OF THE CASE	5
ARGUMENT	7
APPENDIX	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

CASES

United States Supreme Court

Chessman v. Teets, 354 U.S. 156 (1957)	12-13
Cochran v. Kansas, 316 U.S. 255 (1942)	12
Coppedge v. United States, 369 U.S. 438 (1962)	10,11
Dowd v. Cook, 340 U.S. 206 (1951)	12
Enmund v. Florida, 458 U.S. 782 (1982)	5
Evitts v. Lucey, 469 U.S. 387 (1985)	9
Fallen v. United States, 378 U.S. 139 (1964)	6,10
Hill v. Hawes, 320 U.S. 520 (1944)	11

Federal District and Circuit Courts

Blunt v. United States, 244 F.2d 355 (D.C. Cir. 1957)	12
Craig v. Garrison, 549 F.2d 306 (4th Cir. 1977)	7
Houston v. Lack, No. 86-5198 (6th Cir. 1987)	9
Moore v. Nelson, 611 F.2d 434 (2d Cir. 1979)	8
Moorer v. Griffin, 575 F.2d 87 (6th Cir. 1978)	7
Oddo v. United States, 171 F.2d 854 (2d Cir. 1949)	11
Pryor v. Marshall, 711 F.2d 63 (6th Cir. 1983)	8,9
Remine v. United States, 161 F.2d 1020 (6th Cir. 1947)	11
Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964)	11
Riffle v. United States, 299 F.2d 802 (5th Cir. 1962)	11
Sanchez v. Board of Regents of Texas Southern Univ., 625 F.2d 521 (5th Cir. 1980)	11-12
Shah v. Hutto, 704 F.2d 717 (4th Cir), rev'd, 722 F.2d 1167 (4th Cir. 1983), cert. denied, 466 U.S. 975 (1984)	8
United States ex rel. Leonard v. O'Leary, 788 F.2d 1238 (7th Cir. 1986)	9

Unitec States v. Lucas, 597 F.2d 243 (10th Cir. 1979) 7-9

United States v. Shillingford, 568 F.2d 1106 (5th Cir. 1978) 7

Wallace v. United States, 174 F.2d 112 (8th Cir. 1949) 11

Warren v. United States, 358 F.2d 527 (D.C. Cir. 1965) 11

Williams v. Armontrout, 777 F.2d 422 (8th Cir. 1985) 9

Williams v. United States, 188 F.2d 41 (D.C. Cir. 1951) 11

Wyzik v. Employee Ben. Plan of Crane County, 663 F.2d 348 (1st Cir. 1981) 9

CONSTITUTION, STATUTES AND RULES

U.S. Const. amend. XIV 9

28 U.S.C. Section 2253 9

28 U.S.C. Section 2254 5

United States Supreme Court Rule 17.1 7

Federal Rules of Appellate Procedure 4(a) 5,7 8-10

Federal Rules of Appellate Procedure 3 9,11

Federal Rules of Criminal Procedure 2 11

OTHER

Notes of Advisory Committee on Appellate Rules 9,11

PRIOR OPINIONS

The opinions of the District Court and Court of Appeals are appended are exhibits 1 and 2.

The decision of the United States District Court for the Western District of Tennessee is reported at 635 F. Supp. 786 (W.D. Tenn. 1986). The decision of the Sixth Circuit Court of Appeals has not been published.

STATEMENT OF JURISDICTIONAL GROUNDS

This petition for writ of certiorari seeks the review of the dismissal by the Sixth Circuit Court of Appeals of Petitioner's application for writ of habeas corpus. The petition is sought pursuant to 28 U.S.C. 1254. The Sixth Circuit dismissed the application for writ of habeas corpus by order dated May 22, 1987, appended as exhibit 2. A Petition for rehearing en banc was filed but was denied by the court by order dated July 10, 1987, appended as exhibit 3.

RELEVANT STATUTE AND RULES

28 U.S.C. Section 2253

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

. . .

Federal Rules of Appellate Procedure, Rule 3(a)

Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

Federal Rules of Appellate Procedure, Rule 4(a)(1) & (5)

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

. . .

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before the expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

. . .

STATEMENT OF THE CASE

Petitioner was charged with the offense of first degree murder by indictment of the Obion County, Tennessee grand jury on October 11, 1982. On November 15, 1982, petitioner, after being informed that the State would seek the death penalty, entered a guilty plea to the charge of second degree murder and received a fifty year sentence as a range two offender under Tennessee law. Petitioner was not eligible for the death penalty at that time under this Court's holding in Enmund v. Florida, 458 U.S. 92 (1982).

As a result of his plea, petitioner was sentenced under the Tennessee Class X felony law but neither the judge nor his counsel explained to him the nature of the conviction or the serious consequences of his plea. Following the exhaustion of his state remedies, petitioner filed a pro se application for writ of habeas corpus with the United States District Court for the Western District of Tennessee pursuant to 28 U.S.C. Section 2254. The Western District neither appointed counsel nor conducted an evidentiary hearing but dismissed petitioner's petition by written opinion on January 6, 1986. The judgment dismissing the petition was filed on January 7, 1986. On February 3, 1986, petitioner, still proceeding pro se, drafted and presented to his custodians for filing a notice of appeal. The Notice of Appeal was marked "filed" by the District Court on February 7, 1986, one day beyond the thirty day filing period as set forth in Rule 4(a)(1) of the Federal Rules of Appellate P--cedure. Petitioner was never notified that his notice was received late so he never filed a motion for an extension of time as allowed by Federal Rules of Appellate Procedure 4(a)(5).

On February 15, 1986, a certificate of probable cause was filed by the district judge which noted that the

substantive issue presented in petitioner's application was "a question of first impression" in the jurisdiction. On March 5, 1986, the court of appeals circulated a briefing schedule which was received by the pro se petitioner. It was not until March 21, 1986, thirteen days after the time had expired for petitioner to seek an extension of time, that the petitioner was first notified on the untimeliness of his notice of appeal. Petitioner urged the Court of Appeals to reconsider his case in light of this Court's opinion in Fallen v. United States, 378 U.S. 139 (1964). Based on this procedural technicality, the Court of Appeals for the Sixth Circuit refused to reach the merits of petitioner's claim.

ARGUMENT

I. This petition for writ of certiorari should be granted because of the present conflict which exists between the courts of appeals regarding the issue of excuseable neglect in pro se appeals.

One of the reasons that this Court may accept a case upon petition for writ of certiorari exists when "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter." U.S. Sup. Ct. R., Rule 17.1(a). In the case before the bar that is precisely the situation. The Sixth Circuit Court of Appeals dismissed petitioner's appeal frm a denial of his application for a writ of habeas corpus by invoking a rule of strict compliance with Rule 4(a) of the Federal Rules of Appellate Procedure. In a previous decision, the Sixth Circuit had noted the approach of the Tenth Circuit which treated notices of appeal filed within the time set forth in the rule for excusable neglect petitions as motions for extension of time. The Sixth Circuit opted not to follow the approach it had recommended in its earlier decision and consequently deprived petitioner of a hearing on the merits of his constitutional claims.

Prior to the 1979 amendments to Rule 4(a)(5) of the Federal Rules of Appellate Procedure, an untimley filed notice of appeal filed by a pro se litigant within sufficient time to allow the district court to extend the time upon a showing of excusable neglect, entitled the litigant to an opportunity to justify his delay in accordance with the rule. United States v. Lucas, 597 F.2d 243 (10th Cir. 1979); Moorer v. Griffin, 575 F.2d 87 (6th Cir. 1978); United States v. Shillingford, 568 F.2d 1106 (5th Cir. 1978); Craig v. Garrison, 549 F.2d 306 (4th Cir. 1977). The 1979 amendment changed the language of the

excusable neglect extension provision by requiring that the motion requesting an extension be "filed not later than 30 days after the expiration of the time prescribed by Rule 4(a)." Fed. R. App. P. 4(a)(5). Although some courts continued to give the rule the prior interpretation in applying it to pro se litigants, Shah v. Hutto, 704 F.2d 717, 721 (4th Cir. 1983), rev'd on rehearing, 722 F.2d 1167 (4th Cir.1983)(applying the rule with "elasticity" in regard to pro se litigants in light of admonition to be "liberal and flexible in our application and interpretation of Rules 3 and 4"), others have applied the rule rigidly as written even in cases where the equities suggest otherwise, Pryor v. Marshall, 711 F.2d 63 (6th Cir. 1983).

When faced with the issue of applying the 1979 amendments to pro se litigants, the Tenth Circuit in their opinion in United States v. Lucas, 597 F.2d 243 (10th Cir. 1979) saw the inequities which existed for pro se litigants and grappled with the problem that occurs when the pro se petitioner is not notified of his techinical noncompliance until it is too late to remedy the problem by filing a motin for extension: "It would be most helpful if the district court would advise a would-be appellant, and particularly one who is pro se, that his notice of appeal is untimely, thereby putting him on notice that some immediate action is yet required to secure appellate jurisdiction." Id. at 245. Similarly, the Second Circuit has allowed an appeal when the habeas corpus petitioner did not file his notice within the original thirty-days but did so within the excusable neglect extension period. Moore v. Nelson, 611 F.2d 434 (2nd Cir. 1979). See Shah v. Hutto, 704 F.2d 717 (4th Cir. 1983), rev'd, 722 F.2d 1167 (4th Cir. 1983), cert. denied, 466 U.S. 975 (1984)(first holding that the rules must be applied with "elasticity" to pro se litigants, then reversing itself on rehearing).

Although the Sixth Circuit Court of Appeals specifically noted the value of the Tenth Circuit approach as it applies to pro se litigants, Pryor v. Marshall, 711 F.2d 63, n.4 (6th Cir. 1983)(quoting United States v. Lucas, 597 F.2d 243, 245 (10th Cir. 1979)), it rejected the holding and held instead that a late-filed notice of appeal is not a substitute for filing a motion for extension of time under Rule 4(a)(5) and that such a motion must be filed before the expiration of the extension period. Id.; Houston v. Lack, No. 86-5198 Order (May 22, 1987). The First, Fifth, Seventh, and Eighth Circuits seem to concur with the Sixth in disallowing the appeal under such circumstances, although some of these decisions did not squarely face the issue in the pro se context. United States ex rel. Leonard v. O'Leary, 788 F.2d 1238 (7th Cir. 1986); Williams v. Armontrout, 777 F.2d 422 (8th Cir. 1985); Wyzik v. Employee Ben. Plan of Crane County, 663 F.2d 348 (1st Cir. 1981); Barksdale v. Blackburn, 657 F.2d 630 (5th Cir. 1981).

Since petitioner's right to appeal would have been protected by due process had he been appointed counsel, 28 U.S.C. Section 2253; Evitts v. Lucey, 469 U.S. 387 (1985), an equal system of justice cannot allow him to be totally deprived of an appeal because the district court judge did not appoint counsel. U.S. Const. amend. XIV. This approach was suggested by the commentators to the rules which suggest dispensing with rigid application of the rules when to so apply the rules would prohibit them from "exacting fairness". Notes of Advisory Committee on Appellate Rules, General Note, Rule 3. If the approach of the Tenth and Second Circuits cannot be judicially mandated, then at a minimum, the Court should require the federal court clerks to notify pro se litigants when their notice of appeal is untimely so that a motion for extension based upon excusable neglect can quickly be filed.

Petitioner was never advised of his technical noncompliance with Rule 4 until after the period for requesting an extension had expired. All of the court's actions indicated that the appeal was properly filed: the acceptance of the probable cause statement, the notification of briefing schedules. If the rules are to "exact fairness" the pro se litigant must be notified prior to the expiration of the extension time that his notice of appeal was untimely. Notes of Advisory Committee on Appellate Rules, General Note, Rule 3 ("decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules.")(citing Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962); Fallen v. United States, 378 U.S. 139 (1964).

II. This petition for writ of certiorari should be granted to settle a question of federal law or to correct the Sixth Circuit's apparent disregard of Supreme Court precedent.

In the 1964 decision of Fallen v. United States, 378 U.S. 139 (1964), this Court held that "the rules are not, and were not intended to be, a rigid Code to have an inflexible meaning irrespective of circumstances." 378 U.S. at 142. Mr. Fallen, a pro se defendant, had given a letter asking for a new trial and appeal from his criminal conviction to the prison officials to be mailed to the appropriate court clerk. Although the notice left the prison in time to arrive before the due date, the petitioner did not accomplish filing within the time allowed by the rules. Finding that the prisoner had done "all that could reasonably be expected" the Court allowed the appeal declining to "read the Rules so rigidly as to bar a

determination of his appeal on the merits. While it is true that the Court referred specificially to the cautionary admonition in Rule 2 of the Federal Rules of Criminal Procedure and to the inherent appellate right of criminal defendants from their convictions, this distinction is not definitive as is revealed by the general reliance upon this case for the proposition that the rules should be applied elastically by the committee commentators. See Notes of Advisory Committee on Appellate Rules, General Note, Rule 3.

This Court's recognition in Fallen that an inmate, because of his confinement, is oftentimes rendered helpless in his attempt to comply with the procedural technicalities should not be disregarded. Other courts have noted the importance of this finding in similar circumstances. Williams v. United States, 188 F.2d 41 (D.C.Cir. 1951); Wallace v. United States, 174 F.2d 112, 114 (8th Cir. 1949); Remine v. United States, 161 F.2d 1020 (6th Cir. 1947). See Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962)(cases cited therein); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964); Riffle v. United States, 299 F.2d 802 (5th Cir. 1962). Perhaps this Court's Fallen concurrence hit upon the answer when they suggested that in these circumstances, the jailer acts as the court clerk. "To hold [otherwise] would give [the] jailer power to prevent an appeal." Oddo v. United States, 171 F.2d 854, 855 (2d Cir. 1949). See Hill v. Hawes, 320 U.S. 520 (1944).

In addition to viewing whether, under the circumstances, petitioner did all that he could do, courts have viewed the petitioner's detrimental reliance on a reliable source as a grounds for validating a late appeal. Warren v. United States, 358 F.2d 527, 530 (D.C. Cir. 1965)(where detrimentally relied upon prison officials to mail promptly and delay was not attributable to prisoner, appeal should be heard on merits); see Sanchez v. Board of

Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980)("[r]eliance on the normal course of delivery of mail is reasonable and may be the basis for a court to excuse otherwise timely filing"); see also Dowd v. Cook, 340 U.S. 206 (1951); Cochran v. Kansas, 316 U.S. 255 (1942). In this case petitioner deterimentally and justifiably relied upon his custodians to promptly mail his notice of appeal; he was further induced in his reliance by his receipt of the certificate of probable cause and the appellate court briefing schedule. Absolutely nothing happened to alert him to the untimeliness of the filing until it was too late to remedy the situation. Yet the Sixth Circuit's order dismissing the appeal for untimely filing has deprived petitioner of having the substantive constitutional merits of his habeas corpus appeal heard. Had the petitioner only lived elsewhere, his appeal might have been deemed timely. Obvious differences in the application of federal law creates an unjust and unfair disadvantage for litigants dependent on their place of residence. Such distinctions should not be tolerated in a land that boasts of "equal justice for all."

C O N C L U S I O N

As this Court has duly noted, the "overriding responsibility [of the Courts] is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. . . . Chessman v. Teets, 354 U.S. 156, 165 (1957). The extreme constitutional importance of this habeas corpus application was noted by the district judge in his certificate of probable cause. The clear policy of the law requires courts to reach the merits of the issues since to do otherwise would "defeat the interests of justice." Blunt v. United States, 244 F.2d 355, 361 (D.C. Cir. 1957).

> We must be deaf to all suggestions that a valid appeal to the Constitution, . . . comes too late, because courts were not able earlier to enforce what the Constitution demands. . . . The proponent before the Court is not the petitioner but the the Constitution of the United States.

Chessman v. Teets, 354 U.S. 156, 165 (1957). For all these reasons petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari and remand this case to the Sixth Circuit Court of Appeals for a determination of the merits of petitioner's case.

Respectfully Submitted,

Penny J. White

PENNY J. WHITE
Attorney at Law
207 East Unaka Avenue
Johnson City, TN 37601
(615) 928-6005

APPENDIX

Opinion of the United States District Court for the Western District of Tennessee Eastern Division 14a

Opinion of the Sixth Circuit Court of Appeals 14b

Order of the Sixth Circuit Court of Appeals denying Petition for Rehearing En Banc 14c

Order of the Sixth Circuit appointing Counsel 14d

FILED JAN 8 1986 CLERK, U. S. DIST. COURT MIDDLE DIST. OF TENN.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

PRENTISS L. HOUSTON,
Petitioner,

VS. No. 85-1086

LARRY LACK, Warden,
Respondent.

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

This petition for writ of habeas corpus was filed on May 15, 1985, by petitioner Prentiss L. Houston, who alleges that his Tennessee state court conviction is unconstitutional because it is based upon an involuntary guilty plea. Petitioner alleged that the plea was not voluntarily entered because (1) the state court judge failed to fully and adequately inform him of the nature of the charge against him and the consequences of a guilty plea and (2) his court appointed counsel did not render effective assistance, thereby depriving him of his due process rights. For the reasons set forth below, both of these contentions are found to be without merit and the petition is dismissed.

I. PROCEDURAL BACKGROUND AND FACTS.

After filing his answer to the petition, respondent was directed by this Court to file a copy of the transcript of petitioner's state court proceedings. The transcript indicates that petitioner brought a state habeas corpus petition following his conviction, alleging the same grounds as now presented. A

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full evidentiary hearing was conducted by the state court on that petition. Petitioner was represented at that hearing by different counsel than in his trial court proceedings and both petitioner and his court-appointed counsel from the trial court proceedings testified. Based upon the findings of fact at the hearing and the applicable law, petitioner's state habeas corpus petition was denied.

Although this Court is not bound by the state court's findings of fact, such findings are entitled to a presumption of correctness. Martin v. Foltz, 773 F.2d 711, 716 (6th Cir. 1985).[1] Petitioner has not alleged that those findings are incorrect and, in fact, presents only questions of law to this Court in his petition. Furthermore, this Court finds that another evidentiary hearing would not shed any additional light on petitioner's claims and is not required by 28 U.S.C. § 2254(d). Accordingly, a ruling on this petition will be made on the basis of the pleadings of the parties and the state court transcript. See Rule 8(a), Rules Governing § 2254 Proceedings, 28 U.S.C. foll. § 2254.

According to his own statement of the facts, petitioner and a co-defendant were indicted for first degree murder by the Obion County, Tennessee Grand Jury on October 11, 1982. Prior to the indictment, Messrs. Thomas L. Rogers and James M. Glasgow, Jr. were appointed to represent the two defendants. Initially, the

[1] See also Strickland v. Washington, 466 U.S. 468, 104 S.Ct. 2052, 2070 (1984) (noting that state court findings of fact are entitled to deference but that a claim of ineffectiveness of counsel presents mixed questions of law and fact).

attorneys planned to jointly represent both defendants, with Mr. Rogers conducting the bulk of the factual investigation and Mr. Glasgow researching the legal issues presented. Following the indictments, however, the trial court appointed Mr. Glasgow to represent petitioner and Mr. Rogers to represent his co-defendant. Although each defendant had separate counsel at that time, the record indicates that the two attorneys continued to work together, sharing both factual and legal information regarding the defense of their clients. Pre-trial motions for discovery and for psychiatric evaluation were made on behalf of petitioner by Mr. Glasgow. Mr. Rogers made motions for a change of venue, in limine, to exclude evidence, for discovery, for a non-jury trial, and to set aside the indictment against his client.

Sometime following petitioner's indictment and before the entry of his guilty plea, the state prosecutor communicated a plea bargain offer to the attorneys, in which the state would agree to allow the two defendants to plead guilty to second degree murder, as Range II offenders under Tennessee law, with 50 year sentences. Petitioner alleged that at no time during discussions of that offer did Mr. Glasgow inform him of the consequences of entering the guilty plea, specifically that he would be pleading guilty to a Class X felony and would be subject to the requirements for Class X felons.[2] Furthermore, petitioner alleged that on November 15, 1982, the date he entered his guilty plea, the trial court judge also failed to fully and adequately inform him of the nature of the plea and its attendant

[2] See Tenn. Code Ann. § 39-1-703 (1982).

consequences. According to petitioner, it was not until he was incarcerated at the Tennessee State Penitentiary that he learned that, as a Class X felon, he was ineligible for work release, trusteeship status, furloughs, educational or recreational release, credit for good behavior, or any other program that would operate to reduce his sentence or place him in supervised or unsupervised release programs in the community.

The gravamen of petitioner's claim that his plea was not voluntarily entered is that he would not have entered the plea if he had known of the attendant consequences of being convicted of a Class X felony under Tennessee law. In his petition, he charged his court-appointed attorney and the trial judge with fault for failing to fully apprise him of those consequences. In its opinion denying petitioner state habeas corpus relief, the state court summarily dismissed this claim, stating that "A defendant does not have a constitutional right to have the effect of a sentence under the Class X felony statute explained to him." Houston v. State, No. 4556, slip op. at 8 (Cir. Ct. Obion Co. Tenn., Sept. 27, 1983) (citing State v. Wallace, 604 S.W.2d 890 (Tenn. Crim. App. 1980); State v. Hayes, No. 909 (Tenn. Crim. App. Sept. 1, 1983, Knoxville); State v. Minor, No. 123 (Tenn. Crim. App. Dec. 17, 1981, Jackson). In this petition, the only attempt by petitioner to distinguish the cases relied upon by the state court is his allegation that, in his case, neither the trial judge nor his appointed counsel understood the consequences of a Class X conviction.

II. GROUNDS FOR HABEAS CORPUS RELIEF

A. Ineffective Assistance of Counsel

As noted above, petitioner alleged that his conviction is unconstitutional because his guilty plea was not voluntary and because his court-appointed attorney rendered ineffective assistance. For the purposes of discussion, the claim of ineffective assistance of counsel will be addressed first.

Recently, the Supreme Court was presented with a case similar to that now before this Court. In Hill v. Lockhart, ___ U.S.___, 106 S.Ct. 366 (1985), the voluntariness of a guilty plea was at issue in the context of a claim of ineffective assistance of counsel. The alleged ineffectiveness of the petitioner's counsel in that case arose out of an attorney's erroneous advice to the petitioner, William Lloyd Hill, regarding the time he would have to serve under a plea bargain before being eligible for parole. According to Hill, his attorney had informed him that if he pleaded guilty he would have to serve one-third of his prison sentence before being considered for parole. However, because Hill had a prior conviction in another state, he was considered a second offender under Arkansas law and was thus required to serve one-half of his sentence before becoming eligible for parole. Because he had entered his guilty plea upon the mistaken belief that he would be eligible for parole after serving one-third of his sentence, Hill alleged that his plea was not voluntarily entered.

The trial court's denial of Hill's petition for habeas corpus relief was affirmed by a divided panel of the Eighth

Circuit Court of Appeals. 731 F.2d 568 (1984). In an en banc rehearing, an equally divided court affirmed that decision. 764 F.2d 1279 (1985). Hill's petition for a writ of certiorari was then granted by the Supreme Court. ___U.S.___, 105 S.Ct. 1745 (1985).

The Supreme Court began its analysis of Hill's challenge to the voluntariness of his guilty plea by noting that the "long standing test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" 106 S.Ct. at 369 (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962)). Although the issue was not raised by Hill, the Court stated that neither the Constitution nor Rule 11 of the Federal Rules of Criminal Procedure required that the state give a defendant information about parole eligibility in order for a guilty plea to be voluntary. 106 S.Ct. at 369.

With regard to the voluntariness of a guilty plea and a claim of ineffective counsel, the Court stated that the two-part standard for claims of ineffective assistance of counsel adopted in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), was also applicable to challenges to guilty pleas. 106 S.Ct. at 370. That test requires that the petitioner show (1) that his attorney's "representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Id. at 369, quoting Strickland, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068 (1984). The basis for the second part of that test, as noted by the Hill court, is that the mere existence of error on the part of a defendant's attorney does not justify setting aside a criminal judgment unless the judgment was due to the error. Id. at 370, quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2067.

Applying the Strickland test to the case before it, the Hill court found that the petitioner had failed to satisfy the second part of the test. That part requires that the criminal defendant show that his attorney's erroneous advice "prejudiced" him. To show such "prejudice," the defendant "must show that there is a reasonable probility that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 106 S.Ct. at 370. Because he failed to allege that he would not have pleaded guilty but for his attorney's erroneous advice, the Court found that Hill had not shown such prejudice. 106 S.Ct. at 371. Without such an allegation, the second part of the Strickland test was not met and it was not error for the trial court to dismiss the petition without an evidentiary hearing. Id.

Since it was able to dispose of the claim of ineffective assistance of counsel before it for failure to meet the second part of the Strickland test, the Hill court did not determine whether the attorney's erroneous advice concerning parole eligibility was constitutionally ineffective assistance. 106 S.Ct. at 371. Nevertheless, in addressing the claims presented

in this petition, this Court is guided by Hill and its holding that the Strickland test applies to claims of ineffective assistance of counsel in the context of a guilty plea.

Petitioner in this action has alleged that his court-appointed attorney was ineffective because he failed to inform petitioner of all consequences of a Class X felony conviction. No reported cases have been found holding that failure to inform a defendant of the collateral consequences of a Class X felony conviction constitutes ineffective assistance of counsel. This Court is aware, however, of at least four unreported opinions of the Tennessee Court of Criminal Apeals holding that an attorney's failure to explain the effects of a Class X felony conviction to a defendant does not constitute ineffective assistance of counsel. See State v. Reed, No. 85-127-III (Tenn. Crim. App. Nov. 8, 1985, Nashville); Pickett v. State, No. 119 (Tenn. Crim. App. Sept. 6, 1984, Jackson); State v. Hayes, supra; State v. Minor, supra. Because these opinions contain only conclusory statements on this issue, further analysis of petitioner's claim is required.

Without controlling precedent to rely upon, determination of this claim may be made only be application of Strickland's general test. According to Strickland, "the proper standard for attorney performance is that of reasonably effective assistance." 466 U.S. at 687, 104 S.Ct. at 2064. See also Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974). The first prong of the Strickland test, as discussed above, addresses the attorney's performance and requires that the attorney's representation fail

to meet "an objective standard of reasonableness." 466 U.S. at 687-88, 104 S.Ct. at 2065. Although "more specific guidelines" defining that standard were said by the Strickland court to be inappropriate, the Court did set forth "certain basic duties" involved in representing a criminal defendant. 466 U.S. at ___, 104 S.Ct. at 2065. According to the Court, those duties include duties "of loyalty, ... to advocate the defendant's cause, ... to consult with the defendant on important decisions, ... to keep the defendant informed of important developments, ... [and] to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. (citations omitted). Because the list was not intended to be exhaustive or to be used as a "checklist for judicial evaluation," claims of ineffective assistance of counsel alleging the breach of some duty not listed by the Court require resort to "prevailing norms of practice," such as standards promulgated by professional organizations. Id.

Before examining the claim presented by this petitioner, it is noted that review of an attorney's performance under Strickland must be "highly deferential" and include "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at ___, 104 S.Ct. at 2065, 2066. It is only when the reviewing court, considering all the circumstances, finds that the acts or omissions complained of were outside that range that a claim of ineffective assistance of counsel has been shown and habeas corpus relief is due. 466 U.S. at ___, 104 S.Ct. at 2066.

Placing these abstract principles into the setting of a guilty plea, it appears that "reasonable professional assistance" requires that an attorney insure that his client "understood his rights, the nature of the charges and the possible sentence if convicted." Jones v. Parke, 734 F.2d 1142, 1146 (6th Cir. 1984). Although the petitioner herein may assert that his ignorance of a Class X conviction's collateral consequences vitiates any finding that he understood "the possible sentence" his plea would entail, this Court finds that knowledge of all consequences of a possible sentence is not required in order to understand that sentence. Petitioner was informed during the plea colloquy that the state intended to seek either life incarceration or the death penalty if his case went to trial and understood that he was pleading to a lesser charge with a sentence of fifty years. Furthermore, it was made clear at the plea proceedings that the petitioner would have to serve at least twenty years of his sentence. With knowledge and understanding of those terms of the plea, petitioner entered his plea. Because his client was aware of the possible sentence he faced, it cannot be said that the attorney's failure to inform petitioner of every consequence of that sentence constituted ineffective assistance of counsel.

Other courts that have reviewed claims of ineffective assistance of counsel arising out of advice given before a guilty plea have reached similar conclusions. For example, it has been held that failure to inform a defendant of the date on which he would become eligible for parole is not ineffective assistance of

counsel.[3] See e.g., Frank V. United States, 515 F. Supp. 703, 707 (E.D. Pa. 1981). See also United States v. French, 719 F.2d 387 (11th Cir.), cert. denied, ___U.S.___, 104 S.Ct. 2174 (1983) (failure to inform of "binding" plea agreement rule); United States v. Santelises, 509 F.2d 703 (2d Cir. 1975) (failure to inform of possible deportation). The Santelises case is especially persuasive as it is difficult to imagine how a failure to inform a defendant that he will not be eligible for work release or similar programs can constitute ineffective assistance of counsel when the failure to inform the defendant in Santelises that he could be deported as a result of his conviction was found not to constitute ineffective assistance of counsel.

In any case, the alleged failure to inform a defendant of a consequence of his guilty plea must be found to constitute representation below an "objective reasonable standard." As noted above, the Tennessee Court of Criminal Appeals has specifically found that failure to inform a defendant of the consequences of a Class X conviction is not ineffective assistance of counsel. Furthermore, it is evident from a reading of Tennessee Rules of Criminal Procedure 11(c) and the committee comments to the rule that a defendant need not be informed of all collateral consequences of his plea. This Court finds, therefore, that the mere failure of an attorney to inform a

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[3] However, as compared to a failure to inform (as in this petition), erroneous information may at times give rise to a finding of ineffective assistance of counsel if the defendant relied on the misinformation when entering his plea. See Strader v. Garrison, 611 F.2d 61, 65 (4th Cir. 1979) ("grossly misinformed").

defendant of the collateral consequences of a Class X felony conviction does not constitute ineffective assistance of counsel. Because petitioner has not alleged that his attorney failed to inform him of the direct consequences of his plea or gave him grossly incorrect advice about the collateral consequences that he relied upon in making his plea,[4] it cannot be said that any act or omission of his attorney constituted such ineffective assistance of counsel as to render his guilty plea unconstitutional.

In addition to alleging that his counsel rendered ineffective assistance by failing to advise him of all the consequences of a Class X felony conviction, petitioner also alleged that his court-appointed attorney's representation was ineffective because he (1) failed to interview all significant witnesses, (2) failed to request a severance, (3) filed only two motions, and (4) coerced a guilty plea by telling petitioner that the evidence of his guilt was overwhelming. The standard by which this Court examines these claims is the same as that just discussed, whether the representation fell below an "objective standard of reasonableness."

Petitioner alleged that his attorney failed to interview all significant witnesses, yet testified during the plea colloquy that the attorney had talked to everyone that petitioner had asked him to. Transcript (T) 84. In fact, petitioner admitted during his state habeas corpus proceedings that he had only given the attorney the name of one potential witness. Post-conviction

---

[4] Compare Strader, supra n.3.

transcript (PT) at 106. In contrast, petitioner's attorney testified that he went to the scene of the crime on two occasions and spoke with eight to ten potential witnesses. PT 67-68. This testimony was uncontroverted and can only lead to a finding that Mr. Glasgow made reasonable efforts to interview potential witnesses. It is especially significant that petitioner could not name any additional witnesses at his state post-conviction hearing. PT 92. This Court is unable to find that the attorney's efforts at interviewing potential witnesses were not objectively reasonable given petitioner's inability to offer proof that any significant witnesses existed.

Petitioner also alleged that the failure to request a severance amounted to ineffective assistance of counsel. Although a severance may at times be necessary in order to avoid confusing a jury and thereby prevent multiple defendants from obtaining a fair trial, the failure to move for a severance in this case cannot be said to have had any effect since the proceedings had not yet reached a stage in which a jury was involved. Furthermore, in the event petitioner had pleaded not guilty, thereby making a jury trial necessary, Mr. Glasgow could have then moved for a severance prior to the trial.[5] His failure to so move prior to the entry of petitioner's guilty plea

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[5] This is true even if the motion date, as set by the trial judge pursuant to Rule 12(c) of the Tennessee Rules of Criminal Procedure has passed, since a continuing duty exists to grant a severance at any stage of the trial if it appears to the trial court that the defendant would be prejudiced by a joint trial. See United States v. Morgan, 394 F.2d 973 (6th Cir.), cert. denied, 393 U.S. 942 (1968).

can thus not be said to fall below an objective standard of reasonableness.

Mr. Glasgow's filing of only two pre-trial motions is said by petitioner to constitute ineffective assistance of counsel when compared to the fact that the attorney for petitioner's co-defendant filed seven motions. Mr. Glasgow explained this difference, however, by noting that if any of the additional motions filed on behalf of petitioner's co-defendant were granted, he would then have made a similar motion. PT 78. Such a strategic move by petitioner's attorney does not appear unreasonable and, in fact, appears to have been a calculated move by Mr. Glasgow to conserve the efforts of all parties involved without resulting in prejudice to his client. Accordingly, this Court finds that this strategic decision by petitioner's counsel does not constitute grounds to reverse the conviction.

Finally, petitioner alleged that his attorney coerced him into pleading guilty by telling him that the evidence against him was overwhelming. The fact that his attorney so advised petitioner cannot be found to give rise to a finding that the petitioner was deprived of the effective assistance of counsel given the investigation made by Mr. Glasgow and the attorney for petitioner's co-defendant. Again, this Court notes that petitioner provided his attorney with the name of only one witness. After two trips to the scene of the crime and interviews with eight to ten potential witnesses, Mr. Glasgow's belief that it would be in petitioner's best interests to accept a plea bargain does not appear to be unreasonable. Even if his

attitude was perceived by petitioner as being pessimistic, pessimism alone does not constitute ineffective assistance of counsel. See United States v. Rogers, 769 F.2d 1418, 1424 (9th Cir. 1985). Accordingly, this Court finds no evidence to support petitioner's allegation that his guilty plea was coerced by his attorney's advice that the evidence against him was overwhelming.

B. Voluntariness of the Guilty Plea

As noted above, petitioner also alleged that his guilty plea was involuntarily entered because the trial judge failed to inform him of certain consequences of his plea. Rule 11(c) of the Tennessee Rules of Criminal Procedure sets forth the advice that a criminal defendant in Tennessee must be given before a court may accept a guilty plea. According to the rule, the defendant must be advised of and understand (1) the nature of the charge to which he is pleading guilty to, the mandatory minimum punishment, and the possible maximum punishment; (2) his right to an attorney; (3) his right to a jury trial; (4) that he waives his right to a jury trial by pleading guilty; and (5) that any answers he gives during the plea colloquy may later be used against him in a prosecution for perjury or making a false statement.[6] Although it would be desirable for courts to inform criminal defendants of every possible consequence of their pleas, Rule 11 requires only that defendants be made aware of

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6 Tennessee case law also requires that a defendant be informed that "a different or additional punishment may result by reason of his prior convictions or other factors which may be established in the present action after entry of his plea." Tenn. R. Crim. P. 11, Committee Comments (quoting Mackey v. State, 553 S.W.2d 337, 341 (Tenn. 1977)).

those consequences listed in the Rule. See Fed. R. Crim. P. 11 advisory committee note.[7] The consequences listed in the Rule are generally referred to as the "direct" consequences of a plea, in contrast to "collateral" consequences, such as parole eligibility dates or possible deportation, of which a defendant need not be informed for his plea to be voluntary. See 1 C. Wright, Federal Practice and Procedure § 173 (1982).

The dicta in Hill that a state is not required to inform a criminal defendant of the date on which he will be eligible for parole is consistent with the holdings of the Sixth Circuit and other courts of appeal that a defendant need not be told of the collateral consequences of his plea in order for the plea to be voluntary. See, e.g., Berry v. Mintzes, 726 F.2d 1142, 1149-50 (6th Cir.), cert. denied, ___U.S.___, 104 S.Ct. 3520 (1984); Brown v. Perini, 718 F.2d 784, 788 (6th Cir. 1983). See also Downs-Morgan v. United States, 765 F.2d 1534, 1537 (11th Cir. 1985); United States v. Gavilan, 761 F.2d 226, 227-28 (5th Cir. 1985); United States v. Russell, 686 F.2d 35, 38-39 (D.C. Cir. 1982); United States v. Degand, 614 F.2d 176, 177 (8th Cir. 1980); Sanchez v. United States, 572 F.2d 210, 211 (9th Cir. 1977). The requirements of Rule 11(c) are consistent with these opinions.

Although the trial judge in this case did not inform petitioner that his conviction as a Class X felon would result in

[7] According to the Committee Comments, Rule 11 of the Tennessee Rules of Criminal Procedure is "substantially the same" as Rule 11 of the Federal Rules of Criminal Procedure. Tenn. R. Crim. P. 11 Committee Comments. As such, the federal rule's advisory committee note and cases interpreting the federal rule, although not binding, are persuasive.

his being ineligible for the various programs that could operate to shorten his sentence, this Court finds that such effects of a Class X felony conviction are collateral consequences of a guilty plea. Rule 11 and the cases cited above make it clear that the trial judge was not obligated to inform petitioner of such consequences. Accordingly, the guilty plea must be upheld unless the trial judge failed to adequately inform petitioner of the direct consequences enumerated in Rule 11. The following excerpts from the plea colloquy reveal that petitioner was informed of the direct consequences of his plea and indicated that he understood those consequences:

> (questioning of petitioner by his court-appointed attorney)
>
> Q ...Have I (attorney Glasgow) explained to you what the penalty is that the State is seeking in this case, that is the death penalty for first degree murder?
>
> A Yes.
>
> Q Have I explained to you that you've got a right to a trial by jury, and if you don't like what the jury does that you've got a right to appeal that? Do you understand that?
>
> A Yes.
>
> Q All right. You also understand that by entering this guilty plea that you will not have the right to appeal this case. Do you understand that?
>
> A Yes.
>
> . . .
>
> (questioning by trial judge)
>
> Q ...Mr. Glasgow has, as you've just indicated, I believe, he has either read the indictment to you, or he has explained to you what it is that you are accused of in the indictment, what the

indictment says that you are guilty of, so that you understand what it is that you are accused of here.

Is that correct?

A Yes, sir.

Q And he has explained to you your rights. You have just indicated that, I believe, but he has explained to you that you have the right to enter a plea of not guilty here if you are not guilty; you have the right to have a trial by jury, if you chose [sic] to do so, and if you had a jury trial then you could have any witnesses subpoenaed and brought in to testify on your behalf; you can have any other evidence brought in and introduced on your behalf, and then if the jury found you -- then the jury would determine whether or not you are guilty or innocent, and if the jury found you guilty of first degree murder, then the jury would fix your punishment according to law, either at life in the penitentiary or by death by electrocution.

Do you understand that?

A Yes, sir.

. . .

Q I am advised that you are going to enter a plea of guilty to murder in the second degree here. You have not been promised anything, or you have not been threatened in any way in order to get you to enter a plea of guilty, have you?

A No, sir.

Q This plea of guilty is being entered of your own free will. Is that correct?

A Yes, sir.

Q And because you are saying to me that you are guilty of this offense?

A Yes, sir.

Transcript (T) at 83-87. In light of the absence of any evidence that petitioner was not informed of the direct consequences of his guilty plea or that he did not understand those consequences, this Court finds that his guilty plea was voluntarily made. The

portion of his petition that alleges that his guilty plea was involuntary because the trial court failed to inform petitioner of all of the consequences of his plea is, therefore, without merit.

SUMMARY

In summary, this Court makes the following findings:

1. Under the two-part Strickland test for evaluating claims of ineffective assistance of counsel, petitioner has failed to show that his attorney's failure to advise him of certain collateral consequences of a Class X felony conviction constituted assistance of counsel that was not objectively reasonable.

2. Furthermore, it does not appear from the record in this case that the attorney's alleged failure to interview all significant witnesses, failure to request a severance, filing of only two pre-trial motions, and advice to petitioner that the evidence against him was overwhelming amounted to representation of petitioner that was below an objective standard of reasonableness.

3. Finally, neither the Constitution nor Tennessee law require a trial court to inform a criminal defendant of the consequences of being convicted as a Class X felon under Tennessee law.

As a result of these findings, this petition for habeas corpus does not state a constitutional claim for which federal relief is available and is, therefore, dismissed.

IT IS SO ORDERED.

James D. Todd

JAMES D. TODD,
UNITED STATES DISTRICT JUDGE

January 3, 1986

DATE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24
d. a copy must be served on all parties to the case that was given to the court or that was subpoenaed or ordered to be produced for its use;
e. if any party has a good faith objection to the confidential designation under this rule, the party shall give counsel for the party who made the designation notice of the objection and the parties shall follow the local rules of the district court governing discovery disputes;
f. if a party files a motion under Fed. R. Civ. P. 26(c) for a protective order with respect to particular [illegible] which is the subject of a pending motion to dismiss, the party shall, in addition to complying with the requirements of Fed. R. Civ. P. 26(c), set forth in the motion the circumstances which the party contends warrant the court's reconsideration of its prior ruling on the motion to dismiss;
g. a copy [illegible] or any portion thereof may be prominently displayed if the exhibit is required.

Exhibit 2- Appendix 14 b

No. 86-5198

FILED
MAY 21 1987
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRENTISS L. HOUSTON,

Petitioner-Appellant

v.

LARRY LACK, WARDEN, ET AL.,

Respondents-Appellees

ORDER

Before: JONES and RYAN, Circuit Judges, and CELEBREZZE, Senior Circuit Judge

This cause having come before the court upon the briefs of the parties, the record of district court proceedings, and the argument of counsel;

For the reasons stated in open court we have determined that the court is without jurisdiction to entertain the appeal. It is therefore

ORDERED that the case is hereby dismissed for want of jurisdiction; Rule 9(b)(1), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

Leonard Green
Chief Deputy Clerk

Exhibit 4 - Appendix 4

No. 86-5198

FILED
AUG 23 1988
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PRENTISS L. HOUSTON,

Petitioner-Appellant,

v.

LARRY LACK, WARDEN, ET AL.,

Respondents-Appellees.

ORDER

BEFORE: JONES and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge

This matter is before the Court upon consideration of appellant's response to this Court's order to show cause why the appeal should not be dismissed for lack of jurisdiction because of a late filed notice of appeal.

Appellant in his supplemental response suggests that Fallen v. United States, 378 U.S. 139 (1964), requires a remand to the district court for a determination of excusable neglect. It appears that the appointment of counsel would be a substantial benefit to the appellant and to the Court. Appointed counsel is requested as one of the issues to be briefed, to brief the question of whether Fallen, supra, applies to the the instant appeal.

It is ORDERED that the jurisdictional issue be referred to the panel that will hear the case on the merits. It is further ORDERED that counsel be appointed to represent the appellant.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

87-5428

IN THE SUPREME COURT
FOR THE UNITED STATES OF AMERICA

PRENTISS HOUSTON	:	
Petitioner	:	
vs.	:	Case No. _____
LARRY LACK, Warden	:	
Respondent	:	

NOTICE OF APPEARANCE

To the Clerk:

Please enter the appearance of PENNY J. WHITE, Attorney at Law, 207 East Unaka Avenue, Johnson City, Tennessee 37601, telephone number 615 928-6005, not yet a member of this Court's bar, but licensed by the Tennessee Supreme Court since 1981 and appointed to represent the petitioner by the Sixth Circuit United States Court of Appeals, as attorney for petitioner on this Petition for Writ of Certiorari.

Respectfully Submitted,

Penny J. White

PENNY J. WHITE
Attorney at Law
207 East Unaka Avenue
Johnson City, TN 37601
615-928-6005

CERTIFICATE OF SERVICE

I hereby certify that I have mailed by first class mail postage prepaid to the Office of the Tennessee State Attorney General, James Robertson Parkway, Nashville, Tennessee, three copies as required by the Supreme Court Rules of the Petition for Writ of Certiorari, Motion to Proceed In Forma Pauperis, and Notice of Appearance in this case on this the 5th day of September, 1987.

Penny J. White
PENNY J. WHITE

OPPOSITION BRIEF

#V

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

(3)

NO. 87-5428

PRENTISS HOUSTON,

Petitioner,

v.

LARRY LACK,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

W. J. MICHAEL CODY
Attorney General & Reporter

GORDON W. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6439
Counsel of Record

Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

Does a United States Court of Appeals have jurisdiction of an appeal from the denial of a state prisoner's pro se petition for a writ of habeas corpus when the notice of appeal is delivered to prison authorities for mailing prior to the due date but arrives at the clerk's office one day after the due date?

OPINIONS BELOW

The opinions of the district court and court of appeals are attached to the petition as Exhibits 1 and 2.

JURISDICTION

The petitioner seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254. The judgment of the court of appeals was filed on May 22, 1987, and a petition for a rehearing en banc was denied on July 10, 1987.

STATEMENT OF THE CASE

The petitioner was convicted upon a plea of guilty in the Circuit Court of Obion County, Tennessee, of murder in the second degree and was sentenced to fifty (50) years in the state penitentiary. He subsequently attacked the conviction in a post-conviction proceeding in the trial court, alleging that his guilty plea had been involuntary and that he had received ineffective assistance of counsel. The trial court denied relief. The Court of Criminal Appeals affirmed the judgment and the Supreme Court of Tennessee denied review.

On May 11, 1985, the petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the district court. On January 7,1986, the district court entered a judgment denying the petition. The petitioner filed a notice of appeal on February 7, 1986. The court of appeals dismissed the appeal on May 22, 1987. A petition for a rehearing en banc was denied on July 10, 1987.

REASONS FOR DENYING THE WRIT

The respondent submits that the court of appeals correctly dismissed the appeal. The court of appeals did not render a decision in conflict with the decision of another court of appeals; nor decide a federal question in a way in conflict with a state court of last resort; nor so far depart from the accepted and unusual course of jujicial proceedings, nor so far sanction such a departure by a lower court, as to call for the exercise of this Court's power of supervision. See Supreme Court Rule 17.1(a). There being no special and important reasons for a grant of certiorari in this case, the Court in its sound discretion should deny the writ sought here.

ARGUMENT

THE COURT OF APPEALS PROPERLY DISMISSED THE PETITIONER'S APPEAL FOR LACK OF JURISDICTION.

The district court's judgment was entered on January 7, 1986. The petitioner's notice of appeal was filed on February 7, 1986, one (1) day late. Rules 4(a), 26(a), Fed. R. App. P. No extension was requested or granted by the district court. The notice of appeal requirement of Rule 4 is mandatory and jurisdictional. Browder v. Director, Dept. of Correction of Illinois, 434 U.S. 257, 264 (1978). The appeal, therefore, was properly dismissed for lack of jurisdiction.

The petitioner contends that his late-filed notice of appeal, filed within the excusable neglect extension period provided in Rule 4(a), should have been treated as a motion for an extension of time by the court of appeals. He cites United States v. Lucas, 597 F.2d 243 (10th Cir. 1979), and Moore v. Nelson, 611 F.2d 434 (2d Cir. 1979), as cases adopting that approach and in conflict with the court of appeals' holding in the instant case. However, both Lucas and Moore involved notices of appeal filed prior to the effective date of the 1979 amendments to the Federal Rules of Appellate Procedure, which changed Rule 4(a)(5) by specifically requiring that a motion for an extension of time to file a notice of appeal be filed not later than thirty days after the expiration of the original appeal time. Furthermore, Moore is factually distinguishable, a motion for extension of time for filing the notice of appeal having been filed within the thirty-day extension period.

The petitioner further alleges that he deposited his notice of appeal with the prison mail clerk prior to the due date and, therefore, he should have been excused from a timely filing of a notice of appeal under the rule in Fallen v. United States, 378 U.S. 139 (1964), because he had "done all that could reasonably be expected." However, none of the equitable considerations upon which the Court relied in Fallen are present here. Moreover, the record, silent as to the reason for the appellant's delay in depositing his notice of appeal for mailing, fails to show that this petitioner did all that could reasonably be expected in filing his notice of appeal.

CONCLUSION

Based upon these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General & Reporter

GORDON W. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6439

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by first-class, U.S. Mail, postage prepaid, to Penny J. White, Attorney at Law, 207 East Unaka Avenue, Johnson City, Tennessee 37601, on this 18th day of November, 1987. I further certify that all parties have been served.

GORDON W. SMITH
Assistant Attorney General

Sworn to and subscribed before me
this 18th day of November, 1987.

NOTARY PUBLIC

My Commission Expires: 3/8/89

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PRENTISS L. HOUSTON,
Petitioner

v.

LARRY LACK, WARDEN, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

JOINT APPENDIX

W. J. MICHAEL CODY
Attorney General of Tennessee

GORDON W. SMITH
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6439
Counsel for Respondent

PENNY J. WHITE
207 East Unaka Avenue
Johnson City, Tennessee 37601
(615) 928-6005
Counsel for Petitioner

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1987
CERTIORARI GRANTED JANUARY 19, 1988

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Order dismissing petition for writ of habeas corpus, January 6, 1986	2
Judgment, January 7, 1986	19
Order denying motion to copy transcript, January 21, 1986	20
Notice of Appeal February 7, 1986	21
Certificate of Probable Cause, February 18, 1986	22
Order of U.S. Court of Appeals, Sixth Circuit, March 21, 1986	23
Pro Se Request for Judgment of March 21, 1986 order	25
Pro Se Cause for delay, April 3, 1986	26
Order of U.S. Court of Appeals, Sixth Circuit, August 23, 1986	29
Motion for Late Filing, January 27, 1987	30
Order of U.S. Court of Appeals, Sixth Circuit, dimissing for lack of jurisdiction, May 22, 1987	31
Order of U.S. Court of Appeals, Sixth Circuit, denying rehearing en banc, July 10, 1987	32
Order of Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, January 19, 1988	33

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5-15-85	1	ORDER ALLOWING IFP
	2	PETITION FOR WRIT OF HABEAS CORPUS-sn
6-10-85	3	MOTION TO DISMISS
7- 3-85	5	PETITIONER'S BRIEF IN SUPPORT (response to motion to dismiss)
10-31-85	6	ORDER DENYING MOTION TO DISMISS-bh
11-13-85	7	ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS-sn
11-18-85	8	ORDER TO FILE TRANSCRIPT-sn
11-19-85	9	PETITIONER'S RESPONSE IN BRIEF OF THE RESPONDENT'S ANSWER TO THE PETITION FOR WRIT OF HABEAS CORPUS-bh
12-13-85	10	MOTION FOR PERMISSION TO COPY TRANSCRIPTS-sn
1-06-86	11	ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS-gn
	12	JUDGMENT (case dism)-bh
1-21-86	13	ORDER DENYING MOTION FOR PERMISSION TO COPY TRANSCRIPT-sn
2- 7-86	14	APPEAL AS RIGHT OF FROM JUDGMENT OF DISTRICT COURT-vv
	15	PETITIONER'S BRIEF IN SUPPT OF APPEAL-vv
2-18-86	16	CERTIFICATE OF PROBABLE CAUSE-sn
2-19-86	17	REQUEST FOR CPC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

No. 85-1086

PRENTISS L. HOUSTON,
Petitioner,

vs.

LARRY LACK, Warden,
Respondent.

[Filed Jan. 6, 1986]

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

This petition for writ of habeas corpus was filed on May 15, 1985, by petitioner Prentiss L. Houston, who alleges that his Tennessee state court conviction is unconstitutional because it is based upon an involuntary guilty plea. Petitioner alleged that the plea was not voluntarily entered because (1) the state court judge failed to fully and adequately inform him of the nature of the charge against him and the consequences of a guilty plea and (2) his court appointed counsel did not render effective assistance, thereby depriving him of his due process rights. For the reasons set forth below, both of these contentions are found to be without merit and the petition is dismissed.

I. PROCEDURAL BACKGROUND AND FACTS

After filing his answer to the petition, respondent was directed by this Court to file a copy of the transcript of

petitioner's state court proceedings. The transcript indicates that petitioner brought a state habeas corpus petition following his conviction, alleging the same grounds as now presented. A full evidentiary hearing was conducted by the state court on that petition. Petitioner was represented at that hearing by different counsel than in his trial court proceedings and both petitioner and his court-appointed counsel from the trial court proceedings testified. Based upon the findings of fact at the hearing and the applicable law, petitioner's state habeas corpus petition was denied.

Although this Court is not bound by the state court's findings of fact, such findings are entitled to a presumption of correctness. *Martin v. Foltz*, 773 F.2d 711, 716 (6th Cir. 1985).[1] Petitioner has not alleged that those findings are incorrect and, in fact, presents only questions of law to this Court in his petition. Furthermore, this Court finds that another evidentiary hearing would not shed any additional light on petitioner's claims and is not required by 28 U.S.C. § 2254(d). Accordingly, a ruling on this petition will be made on the basis of the pleadings of the parties and the state court transcript. *See* Rule 8(a), Rules Governing § 2254 Proceedings, 28 U.S.C. foll. § 2254.

According to his own statement of the facts, petitioner and a co-defendant were indicted for first degree murder by the Obion County, Tennessee Grand Jury on October 11, 1982. Prior to the indictment, Messrs. Thomas L. Rogers and James M. Glasgow, Jr. were appointed to represent the two defendants. Initially, the attorneys planned to jointly represent both defendants, with Mr. Rogers conducting the bulk of the factual investigation and Mr. Glasgow researching the legal issues presented. Following the indictments, however, the trial court ap-

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[1] *See also Strickland v. Washington*, 466 U.S. 468, 104 S.Ct. 2052, 2070 (1984) (noting that state court findings of fact are entitled to deference but that a claim of ineffectiveness of counsel presents mixed questions of law and fact).

pointed Mr. Glasgow to represent petitioner and Mr. Rogers to represent his co-defendant. Although each defendant had separate counsel at that time, the record indicates that the two attorneys continued to work together, sharing both factual and legal information regarding the defense of their clients. Pre-trial motions for discovery and for psychiatric evaluation were made on behalf of petitioner by Mr. Glasgow. Mr. Rogers made motions for a change of venue, in limine, to exclude evidence, for discovery, for a non-jury trial, and to set aside the indictment against his client.

Sometime following petitioner's indictment and before the entry of his guilty plea, the state prosecutor communicated a plea bargain offer to the attorneys, in which the state would agree to allow the two defendants to plead guilty to second degree murder, as Range II offenders under Tennessee law, with 50 year sentences. Petitioner alleged that at no time during discussions of that offer did Mr. Glasgow inform him of the consequences of entering the guilty plea, specifically that he would be pleading guilty to a Class X felony and would be subject to the requirements for Class X felons.[2] Furthermore, petitioner alleged that on November 15, 1982, the date he entered his guilty plea, the trial court judge also failed to fully and adequately inform him of the nature of the plea and its attendant consequences. According to petitioner, it was not until he was incarcerated at the Tennessee State Penitentiary that he learned that, as a Class X felon, he was ineligible for work release, trusteeship status, furloughs, educational or recreational release, credit for good behavior, or any other program that would operate to reduce his sentence or place him in supervised or unsupervised release programs in the community.

The gravamen of petitioner's claim that his plea was not voluntarily entered is that he would not have entered the plea if he had known of the attendant consequences

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[2] *See* Tenn. Code Ann. § 39-1-703 (1982).

of being convicted of a Class X felony under Tennessee law. In his petition, he charged his court-appointed attorney and the trial judge with fault for failing to fully apprise him of those consequences. In its opinion denying petitioner state habeas corpus relief, the state court summarily dismissed this claim, stating that "A defendant does not have a constitutional right to have the effect of a sentence under the Class X felony statute explained to him." *Houston v. State*, No. 4556, slip op. at 8 (Cir. Ct. Obion Co. Tenn., Sept. 27, 1983) (citing *State v. Wallace*, 604 S.W.2d 890 (Tenn. Crim. App. 1980); *State v. Hayes*, No. 909 (Tenn. Crim. App. Sept. 1, 1983, Knoxville); *State v. Minor*, No. 123 (Tenn. Crim. App. Dec. 17, 1981, Jackson). In this petition, the only attempt by petitioner to distinguish the cases relied upon by the state court is his allegation that, in his case, neither the trial judge nor his appointed counsel understood the consequences of a Class X conviction.

II. GROUNDS FOR HABEAS CORPUS RELIEF

A. *Ineffective Assistance of Counsel*

As noted above, petitioner alleged that his conviction is unconstitutional because his guilty plea was not voluntary and because his court-appointed attorney rendered ineffective assistance. For the purposes of discussion, the claim of ineffective assistance of counsel will be addressed first.

Recently, the Supreme Court was presented with a case similar to that now before this Court. In *Hill v. Lockhart*, —— U.S. ——, 106 S.Ct. 366 (1985), the voluntariness of a guilty plea was at issue in the context of a claim of ineffective assistance of counsel. The alleged ineffectiveness of the petitioner's counsel in that case arose out of an attorney's erroneous advice to the petitioner, William Lloyd Hill, regarding the time he would have to serve under a plea bargain before being eligible for parole. According to Hill, his attorney had

informed him that if he pleaded guilty he would have to serve one-third of his prison sentence before being considered for parole. However, because Hill had a prior conviction in another state, he was considered a second offender under Arkansas law and was thus required to serve one-half of his sentence before becoming eligible for parole. Because he had entered his guilty plea upon the mistaken belief that he would be eligible for parole after serving one-third of his sentence, Hill alleged that his plea was not voluntarily entered.

The trial court's denial of Hill's petition for habeas corpus relief was affirmed by a divided panel of the Eighth Circuit Court of Appeals. 731 F.2d 568 (1984). In an *en banc* rehearing, an equally divided court affirmed that decision. 764 F.2d 1279 (1985). Hill's petition for a writ of certiorari was then granted by the Supreme Court. —— U.S. ——, 105 S.Ct. 1745 (1985).

The Supreme Court began its analysis of Hill's challenge to the voluntariness of his guilty plea by noting that the "long standing test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" 106 S.Ct. at 369 (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Machibroda v. United States*, 368 U.S. 487, 493 (1962)). Although the issue was not raised by Hill, the Court stated that neither the Constitution nor Rule 11 of the Federal Rules of Criminal Procedure required that the state give a defendant information about parole eligibility in order for a guilty plea to be voluntary. 106 S.Ct. at 369.

With regard to the voluntariness of a guilty plea and a claim of ineffective counsel, the Court stated that the two-part standard for claims of ineffective assistance of counsel adopted in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), was also applicable to challenges to guilty pleas. 106 S.Ct. at 370. That test requires that the petitioner show (1) that his attorney's "representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 369, quoting *Strickland*, 466 U.S. at 687-88, 694, 104 S.Ct. at 2065, 2068 (1984). The basis for the second part of that test, as noted by the *Hill* court, is that the mere existence of error on the part of a defendant's attorney does not justify setting aside a criminal judgment unless the judgment was due to the error. *Id.* at 370, quoting *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2067.

Applying the *Strickland* test to the case before it, the *Hill* court found that the petitioner had failed to satisfy the second part of the test. That part requires that the criminal defendant show that his attorney's erroneous advice "prejudiced" him. To show such "prejudice," the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 106 S.Ct. at 370. Because he failed to allege that he would not have pleaded guilty but for his attorney's erroneous advice, the Court found that Hill had not shown such prejudice. 106 S.Ct. at 371. Without such an allegation, the second part of the *Strickland* test was not met and it was not error for the trial court to dismiss the petition without an evidentiary hearing. *Id.*

Since it was able to dispose of the claim of ineffective assistance of counsel before it for failure to meet the second part of the *Strickland* test, the *Hill* court did not determine whether the attorney's erroneous advice concerning parole eligibility was constitutionally ineffective assistance. 106 S.Ct. at 371. Nevertheless, in addressing the claims presented in this petition, this Court is guided by *Hill* and its holding that the *Strickland* test applies

to claims of ineffective assistance of counsel in the context of a guilty plea.

Petitioner in this action has alleged that his court-appointed attorney was ineffective because he failed to inform petitioner of all consequences of a Class X felony conviction. No reported cases have been found holding that failure to inform a defendant of the collateral consequences of a Class X felony conviction constitutes ineffective assistance of counsel. This Court is aware, however, of at least four unreported opinions of the Tennessee Court of Criminal Appeals holding that an attorney's failure to explain the effects of a Class X felony conviction to a defendant does not constitute ineffective assistance of counsel. *See State v. Reed*, No. 85-127-III (Tenn. Crim. App. Nov. 8, 1985, Nashville); *Pickett v. State*, No. 119 (Tenn. Crim. App. Sept. 6, 1984, Jackson); *State v. Hayes*, *supra*; *State v. Minor*, *supra*. Because these opinions contain only conclusory statements on this issue, further analysis of petitioner's claim is required.

Without controlling precedent to rely upon, determination of this claim may be made only be application of *Strickland's* general test. According to *Strickland*, "the proper standard for attorney performance is that of reasonably effective assistance." 466 U.S. at 687, 104 S.Ct. at 2064. *See also Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974). The first prong of the *Strickland* test, as discussed above, addresses the attorney's performance and requires that the attorney's representation fail to meet "an objective standard of reasonableness." 466 U.S. at 687-88, 104 S.Ct. at 2065. Although "more specific guidelines" defining that standard were said by the *Strickland* court to be inappropriate, the Court did set forth "certain basic duties" involved in representing a criminal defendant. 466 U.S. at ——, 104 S.Ct. at 2065. According to the Court, those duties include duties "of loyalty, . . . to advocate the defendant's cause, . . . to consult with the defendant on important decisions, . . . to

keep the defendant informed of important developments, . . . [and] to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* (citations omitted). Because the list was not intended to be exhaustive or to be used as a "checklist for judicial evaluation," claims of ineffective assistance of counsel alleging the breach of some duty not listed by the Court require resort to "prevailing norms of practice," such as standards promulgated by professional organizations. *Id.*

Before examining the claim presented by this petitioner, it is noted that review of an attorney's performance under *Strickland* must be "highly deferential" and include "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at ——, 104 S.Ct. at 2065, 2066. It is only when the reviewing court, considering all the circumstances, find that the acts or omissions complained of were outside that range that a claim of ineffective assistance of counsel has been shown and habeas corpus relief is due. 466 U.S. at ——, 104 S.Ct. at 2066.

Placing these abstract principles into the setting of a guilty plea, it appears that "reasonable professional assistance" requires that an attorney insure that his client "understood his rights, the nature of the charges and the possible sentence if convicted." *Jones v. Parke*, 734 F.2d 1142, 1146 (6th Cir. 1984). Although the petitioner herein may assert that his ignorance of a Class X conviction's collateral consequences vitiates any finding that he understood "the possible sentence" his plea would entail, this Court finds that knowledge of all consequences of a possible sentence is not required in order to understand that sentence. Petitioner was informed during the plea colloquy that the state intended to seek either life incarceration or the death penalty if his case went to trial and understood that he was pleading to a lesser charge with a sentence of fifty years. Furthermore, it was made clear at the plea proceedings that the peti-

tioner would have to serve at least twenty years of his sentence. With knowledge and understanding of those terms of the plea, petitioner entered his plea. Because his client was aware of the possible sentence he faced, it cannot be said that the attorney's failure to inform petitioner of every consequence of that sentence constituted ineffective assistance of counsel.

Other courts that have reviewed claims of ineffective assistance of counsel arising out of advice given before a guilty plea have reached similar conclusions. For example, it has been held that failure to inform a defendant of the date on which he would become eligible for parole is not ineffective assistance of counsel.[3] *See e.g., Frank v. United States*, 515 F. Supp. 703, 707 (E.D. Pa. 1981). *See also United States v. French*, 719 F.2d 387 (11th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 2174 (1983) (failure to inform of "binding" plea agreement rule); *United States v. Santelises*, 509 F.2d 703 (2d Cir. 1975) (failure to inform of possible deportation). The *Santelises* case is especially persuasive as it is difficult to imagine how a failure to inform a defendant that he will not be eligible for work release or similar programs can constitute ineffective assistance of counsel when the failure to inform the defendant in *Santelises* that he could be deported as a result of his conviction was found not to constitute ineffective assistance of counsel.

In any case, the alleged failure to inform a defendant of a consequence of his guilty plea must be found to constitute representation below an "objective reasonable standard." As noted above, the Tennessee Court of Criminal Appeals has specifically found that failure to inform a defendant of the consequences of a Class X conviction

[3] However, as compared to a failure to inform (as in this petition), erroneous information may at times give rise to a finding of ineffective assistance of counsel if the defendant relied on the misinformation when entering his plea. *See Strader v. Garrison*, 611 F.2d 61, 65 (4th Cir. 1979) ("grossly misinformed").

is not ineffective assistance of counsel. Furthermore, it is evident from a reading of Tennessee Rules of Criminal Procedure 11(c) and the committee comments to the rule that a defendant need not be informed of all collateral consequences of his plea. This Court finds, therefore, that the mere failure of an attorney to inform a defendant of the collateral consequences of a Class X felony conviction does not constitute ineffective assistance of counsel. Because petitioner has not alleged that his attorney failed to inform him of the direct consequences of his plea or gave him grossly incorrect advice about the collateral consequences that he relied upon in making his plea,[4] it cannot be said that any act or omission of his attorney constituted such ineffective assistance of counsel as to render his guilty plea unconstitutional.

In addition to alleging that his counsel rendered ineffective assistance by failing to advise him of all the consequences of a Class X felony conviction, petitioner also alleged that his court-appointed attorney's representation was ineffective because he (1) failed to interview all significant witnesses, (2) failed to request a severance, (3) filed only two motions, and (4) coerced a guilty plea by telling petitioner that the evidence of his guilt was overwhelming. The standard by which this Court examines these claims is the same as that just discussed, whether the representation fell below an "objective standard of reasonableness."

Petitioner alleged that his attorney failed to interview all significant witnesses, yet testified during the plea colloquy that the attorney had talked to everyone that petitioner had asked him to. Transcript (T) 84. In fact, petitioner admitted during his state habeas corpus proceedings that he had only given the attorney the name of one potential witness. Post-conviction transcript (PT) at 106. In contrast, petitioner's attorney testified that he

[4] Compare *Strader, supra* n.3.

went to the scene of the crime on two occasions and spoke with eight to ten potential witnesses. PT 67-68. This testimony was uncontroverted and can only lead to a finding that Mr. Glasgow made reasonable efforts to interview potential witnesses. It is especially significant that petitioner could not name any additional witnesses at his state post-conviction hearing. PT 92. This Court is unable to find that the attorney's efforts at interviewing potential witnesses were not objectively reasonable given petitioner's inability to offer proof that any significant witnesses existed.

Petitioner also alleged that the failure to request a severance amounted to ineffective assistance of counsel. Although a severance may at times be necessary in order to avoid confusing a jury and thereby prevent multiple defendants from obtaining a fair trial, the failure to move for a severance in this case cannot be said to have had any effect since the proceedings had not yet reached a stage in which a jury was involved. Furthermore, in the event petitioner had pleaded not guilty, thereby making a jury trial necessary, Mr. Glasgow could have then moved for a severance prior to the trial.[5] His failure to so move prior to the entry of petitioner's guilty plea can thus not be said to fall below an objective standard of reasonableness.

Mr. Glasgow's filing of only two pre-trial motions is said by petitioner to constitute ineffective assistance of counsel when compared to the fact that the attorney for petitioner's co-defendant filed seven motions. Mr. Glasgow explained this difference, however, by noting that if any of the additional motions filed on behalf of petitioner's co-defendant were granted, he would then have made a similar motion. PT 78. Such a strategic move by petitioner's attorney does not appear unreasonable and, in fact, appears to have been a calculated move by Mr. Glasgow to conserve the efforts of all parties involved without resulting in prejudice to his client. Accordingly, this Court finds that this strategic decision by petitioner's counsel does not constitute grounds to reverse the conviction.

[5] This is true even if the motion date, as set by the trial judge pursuant to Rule 12(c) of the Tennessee Rules of Criminal Procedure has passed, since a continuing duty exists to grant a severance at any stage of the trial if it appears to the trial court that the defendant would be prejudiced by a joint trial. *See United States v. Morgan*, 394 F.2d 973 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968).

Finally, petitioner alleged that his attorney coerced him into pleading guilty by telling him that the evidence against him was overwhelming. The fact that his attorney so advised petitioner cannot be found to give rise to a finding that the petitioner was deprived of the effective assistance of counsel given the investigation made by Mr. Glasgow and the attorney for petitioner's co-defendant. Again, this Court notes that petitioner provided his attorney with the name of only one witness. After two trips to the scene of the crime and interviews with eight to ten potential witnesses, Mr. Glasgow's belief that it would be in petitioner's best interests to accept a plea bargain does not appear to be unreasonable. Even if his attitude was perceived by petitioner as being pessimistic, pessimism alone does not constitute ineffective assistance of counsel. *See United States v. Rogers*, 769 F.2d 1418, 1424 (9th Cir. 1985). Accordingly, this Court finds no evidence to support petitioner's allegation that his guilty plea was coerced by his attorney's advice that the evidence against him was overwhelming.

B. *Voluntariness of the Guilty Plea*

As noted above, petitioner also alleged that his guilty plea was involuntarily entered because the trial judge failed to inform him of certain consequences of his plea. Rule 11(c) of the Tennessee Rules of Criminal Procedure sets forth the advice that a criminal defendant in Tennessee must be given before a court may accept a guilty plea. According to the rule, the defendant must be ad-

vised of and understand (1) the nature of the charge to which he is pleading guilty to, the mandatory minimum punishment, and the possible maximum punishment; (2) his right to an attorney; (3) his right to a jury trial; (4) that he waives his right to a jury trial by pleading guilty; and (5) that any answers he gives during the plea colloquy may later be used against him in a prosecution for perjury or making a false statement.[6] Although it would be desirable for courts to inform criminal defendants of every possible consequence of their pleas, Rule 11 requires only that defendants be made aware of those consequences listed in the Rule. *See* Fed. R. Crim. P. 11 advisory committee note.[7] The consequences listed in the Rule are generally referred to as the "direct" consequences of a plea, in contrast to "collateral" consequences, such as parole eligibility dates or possible deportation, of which a defendant need not be informed for his plea to be voluntary. *See* 1 C. Wright, Federal Practice and Procedure § 173 (1982).

The dicta in *Hill* that a state is not required to inform a criminal defendant of the date on which he will be eligible for parole is consistent with the holdings of the Sixth Circuit and other courts of appeal that a defendant need not be told of the collateral consequences of his plea in order for the plea to be voluntary. *See, e.g., Berry v. Mintzes*, 726 F.2d 1142, 1149-50 (6th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 3520 (1984);

[6] Tennessee case law also requires that a defendant be informed that "a different or additional punishment may result by reason of his prior convictions or other factors which may be established in the present action after entry of his plea." Tenn. R. Crim. P. 11, Committee Comments (quoting *Mackey v. State*, 553 S.W.2d 337, 341 (Tenn. 1977)).

[7] According to the Committee Comments, Rule 11 of the Tennessee Rules of Criminal Procedure is "substantially the same" as Rule 11 of the Federal Rules of Criminal Procedure. Tenn. R. Crim. P. 11 Committee Comments. As such, the federal rule's advisory committee note and cases interpreting the federal rule, although not binding, are persuasive.

Brown v. Perini, 718 F.2d 784, 788 (6th Cir. 1983). *See also Downs-Morgan v. United States*, 765 F.2d 1534, 1537 (11th Cir. 1985); *United States v. Gavilan*, 761 F.2d 226, 227-28 (5th Cir. 1985); *United States v. Russell*, 686 F.2d 35, 38-39 (D.C. Cir. 1982); *United States v. Degand*, 614 F.2d 176, 177 (8th Cir. 1980); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977). The requirements of Rule 11(c) are consistent with these opinions.

Although the trial judge in this case did not inform petitioner that his conviction as a Class X felon would result in his being ineligible for the various programs that could operate to shorten his sentence, this Court finds that such effects of a Class X felony conviction are collateral consequences of a guilty plea. Rule 11 and the cases cited above make it clear that the trial judge was not obligated to inform petitioner of such consequences. Accordingly, the guilty plea must be upheld unless the trial judge failed to adequately inform petitioner of the direct consequences enumerated in Rule 11. The following excerpts from the plea colloquy reveal that petitioner was informed of the direct consequences of his plea and indicated that he understood those consequences:

> (questioning of petitioner by his court-appointed attorney)
>
> Q . . . Have I (attorney Glasgow) explained to you what the penalty is that the State is seeking in this case, that is the death penalty for first degree murder?
>
> A Yes.
>
> Q Have I explained to you that you've got a right to trial by jury, and if you don't like what the jury does that you've got a right to appeal that? Do you understand that?
>
> A Yes.

Q All right. You also understand that by entering this guilty plea that you will not have the right to appeal this case. Do you understand that?

A Yes.

. . .

(questioning by trial judge)

Q . . . Mr. Glasgow has, as you've just indicated, I believe, he has either read the indictment to you, or he has explained to you what it is that you are accused of in the indictment, what the indictment says that you are guilty of, so that you understand what it is that you are accused of here.

Is that correct?

A Yes, sir.

Q And he has explained to you your rights. You have just indicated that, I believe, but he has explained to you that you have the right to enter a plea of not guilty here if you are not guilty; you have the right to have a trial by jury, if you chose [sic] to do so, and if you had a jury trial then you could have any witnesses subpoenaed and brought in to testify on your behalf; you can have any other evidence brought in and introduced on your behalf, and then if the jury found you—then the jury would determine whether or not you are guilty or innocent, and if the jury found you guilty of first degree murder, then the jury would fix your punishment according to law, either at life in the penitentiary or by death by electrocution.

Do you understand that?

A Yes, sir.

. . .

Q I am advised that you are going to enter a plea of guilty to murder in the second degree here. You have not been promised anything, or you have not

been threatned in any way in order to get you to enter a plea of guilty, have you?

A No, sir.

Q This plea of guilty is being entered of your own free will. Is that correct?

A Yes, sir.

Q And because you are saying to me that you are guilty of this offense?

A Yes, sir.

Transcript (T) at 83-87. In light of the absence of any evidence that petitioner was not informed of the direct consequences of his guilty plea or that he did not understand those consequences, this Court finds that his guilty plea was voluntarily made. The portion of his petition that alleges that his guilty plea was involuntary because the trial court failed to inform petitioner of all of the consequences of his plea is, therefore, without merit.

SUMMARY

In summary, this Court makes the following findings:

1. Under the two-part *Strickland* test for evaluating claims of ineffective assistance of counsel, petitioner has failed to show that his attorney's failure to advise him of certain collateral consequences of a Class X felony conviction constituted assistance of counsel that was not objectively reasonable.

2. Furthermore, it does not appear from the record in this case that the attorney's alleged failure to interview all significant witnesses, failure to request a severance, filing of only two pre-trial motions, and advice to petitioner that the evidence against him was overwhelming amounted to representation of petitioner that was below an objective standard of reasonableness.

3. Finally, neither the Constitution nor Tennessee law require a trial court to inform a criminal defendant of the consequences of being convicted as a Class X felon under Tennessee law.

As a result of these findings, this petition for habeas corpus does not state a constitutional claim for which federal relief is available and is, therefore, dismissed.

IT IS SO ORDERED.

/s/ James D. Todd
JAMES D. TODD
United States District Judge

January 3, 1986

UNITED STATES DISTRICT COURT
WESTERN TENNESSEE
EASTERN DIVISION

(Title Omitted in Printing)

JUDGMENT

☒ Decision by Court. This action came to consideration before the Court with the judge named below presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That in compliance with the Order entered on January 6, 1986 in the above-styled case, this case is hereby DISMISSED.

APPROVED:

/s/ James D. Todd
JAMES D. TODD
U.S. District Judge

J. FRANKLIN REID
Clerk

/s/ A. Vaughan
Deputy Clerk

Date 1-7-86

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Title Omitted in Printing)

ORDER DENYING MOTION FOR PERMISSION TO COPY TRANSCRIPT

Petitioner has filed a motion seeking permission to copy the transcript of his state court proceedings that this Court ordered respondent to file in this cause. According to his motion, petitioner attempted, and failed, to obtain the transcript from other sources and now requests that this Court mail him its copy of the transcript so that he can copy and then return it to the Court.

Submitted by petitioner in support of his motion were copies of denials of similar motions made by petitioner in the state courts. Of particular interest to this Court is the denial by the Honorable Phil B. Harris dated June 8, 1985, in which Judge Harris stated that a "transcript of the entire proceedings was furnished the Petitioner" on October 17, 1983. Because it appears to this Court that petitioner has already been given one copy of the transcript of his state court proceedings, no reason for granting the present motion exists and it is, therefore, denied.

IT IS SO ORDERED.

January 21, 1986
Date

/s/ James D. Todd
JAMES D. TODD
United States District Judge

IN THE
UNITED STATES DISTRICT COURT OF APPEALS
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Title Omitted in Printing)

Appeal as Right of from Judgment of District Court

NOTICE OF APPEAL

Notice is hereby given that I, Prentiss L. Houston, petitioner above named, hereby appeals to the United States Court of Appeals for the 6th Circuit from the order dismissing petition for writ of habeas corpus entered in this action on the 3 day of Feb. 1986.

/s/ Prentiss L. Houston 97491
PRENTISS L. HOUSTON 97491
L.C.R.F. Route 1 Box 330
Tiptonville, TN 38079

[Filed Feb. 7, 1986]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

(Title Omitted in Printing)

CERTIFICATE OF PROBABLE CAUSE

Because this case presents a question of first impression, namely, whether an attorney's failure to inform a defendant of the consequences of a Class X felony constitutes ineffective assistance of counsel in the setting of a guilty plea, this Court hereby makes this certificate of probable cause in accordance with Rule 22(b) of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

/s/ James D. Todd
JAMES D. TODD
United States District Judge

February 18, 1986
Date

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-5198

PRENTISS L. HOUSTON,
Petitioner-Appellant,

v.

LARRY LACK, WARDEN, *et al.*,
Respondents-Appellees.

[Filed March 21, 1986]

ORDER

Appellant is appealing from the judgment dismissing his petition for writ of habeas corpus.

It appears from the record that the judgment was entered Januray 7, 1986, and that the notice of appeal was filed on February 7, 1986. This filing occurred 1 day late. Rules 4(a) and 26(a), Federal Rules of Appellate Procedure.

It further appears from the record that appellant did not apply to the district court for an extension of time within which to file his notice of appeal late, due to excusable neglect, and it appears that no such extension has been granted by the district court.

It is therefore ORDERED that appellant show cause in writing not later than 21 days from the file date of this order why the appeal should not be dismissed for lack of jurisdiction.

It is further ORDERED that the briefing schedule be held in abeyance pending resolution of the question of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title Omitted in Printing)

REQUEST FOR JUDGMENT

Comes now the petitioner, by and through himself, herein requesting that this court accept his notice of appeal.

On the date of March 21, 1986, an order to show good cause for the petitioner's notice of appeal, arriving (1) one day late. The clerk of this court sent this order to the petitioner. The petitioner immediately responded to the order explaining that problems within the prison system were the reason for his delay. And the petitioner sent a copy of the date that the prison mailed his appeal. The petitioner submits the following, as support for this request:

In respect to the F.R.A.P., rules 3, 4:

> *Fallen v. United States*, 378 U.S. 139, 84 S. Ct. 1689, 12 L.Ed.2d 760 (1964) notice of appeal by a prisoner, in the form of a letter delivered, well within the time fixed for appeal, to prison authorities for mailing to the clerk of the district court held timely notwithstanding that it was received by the clerk after expiration of the time for appeal: the appellant "did all he could" to effect timely filing (and so did the petitioner here)

Therefore, the petitioner hereby prays upon this honorable court to accept his appeal and thereafter set a new briefing date.

Respectfully submitted,

/s/ Prentiss L. Houston
PRENTISS L. HOUSTON 97491
L.C.R.F.
Rt. 1 Box 330
Tiptonville, Tennessee 38079

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title Omitted in Printing)

[Filed April 3, 1986]

CAUSE FOR DELAY

Comes now the petitioner/appellant, Prentiss L. Houston, by and through himself in order to show cause respecting the Order entered on March 21, 1986, by John P. Hehman, Clerk for the Court of Appeals, for the Sixth Circuit.

It is duly submitted that I, the petitioner, is now and has been an inmate in the State of Tennessee's Prison System. Also, I am a layman of the law, with only little understanding thereto. With this being true, the petitioner can only rely on his own research and the help that he can obtain from others of whom are mostly layman themselves. Therefore, the following is entered for reason pertaining to the appeals lateness:

(1) As the records will show, the petitioner has been detained in the State of Tennessee's Prison, at Turney Center, Route 1, Only, Tennessee 37140. In the month of July 1985, a severe riot occurred at Turney Center, with much damage resulting from this incident. During this riot the institution's legal material was burned and destroyed leaving the petitioner with little hope of continuing the proper and adequate research needed to submit his appeal. Furthermore, following this riot, the entire institution was placed on a lockdown of all inmates. This was continued up and until the month of January, and afterwards.

At the time the petitioner/appellant received the District Court's Order of Dismissal, he was undergoing having to work six days a week and the legal material had yet to be adequately restored.

On the date of January 13, 1986, the petitioner/appellant was transferred to another institution, that being his present location: Lake County Regional, Route 1, Box 330, Tiptonville, Tennessee 38079. During the first week at this new prison, the petitioner/appellant underwent what is called orientation, of which all newly arrived inmates must go through. Following the above mentioned occurences, of which no one should be of fault, the petitioner began his appeal.

On the date of February 3, 1986, the petitioner/appellant forwarded his appeal to the Appeals Court. However, inadvertantly the appeal was sent to Jackson, Tennessee. By having no knowledge that the mail could not travel promptly enough to allow his material to reach it's destination by no later than February 6, 1986 the petitioner/appellant believed that the post date would be the filing date.

Finally, the petitioner/appellant submits the following:

It was requested, of the institution, to certify the petitioner/appellant's material for proof that it had been mailed before the expiration date and further it was requested to be sent airmail. However, there exists institutional policies which prohibit any of the above, unless an inmate can pay the costs himself. This was impossible due that the petitioner-appellant had no funds at the time his appeal was mailed.

Hereto, an exhibit is attached to show this court that the petitioner/appellant did mail the appeal out on the date of February 3, 1986, although it was first sent to Jackson, Tennessee rather than the proper court.

The petitioner hereby prays upon this court to allow his appeal to stand as the day late arouse from circumstances beyond his control rather than inexcusable neglect.

Respectfully Submitted,

/s/ Prentiss L. Houston
PRENTISS L. HOUSTON 97491

2-3-86

"Incoming Legal"

- Thornton, James C.
Boone, Welford, Clark, Langschmidt & Apperson
Law Offices
Suite 2200, One Commerce Square
Memphis, Tenn. 38103

Outgoing Legal (2-3-86)

- Allen, Charles E.
Clerk & Master
U.S. Dist. Court
Western Dist. Western Div.
Memphis, TN. 38103

- Allen, Charles Edward (Aref Imad Al-Din)
Mark L. Hayes, Attorney at law
311 Church Street, Tiptonville, TN. 38079
2-3-86 Out going mail

Prentice Houston United States Dist. Court of appeal - Box 207 Jackson, Tn. 38302

Prentice Houston - assistant att. Gen.
450 James Robertson Pky. Nashville, Tn.
37219
2-4-86

Jerome - Richard L. Kaiser
Public defender criminal Div 1202
Stahlman Bldg. Nashville, Tn. 37201

No Inmate Name Harry P. Asgaith att at law
810 Third National Bank Bldg.
Knoxville, Tn. 37902

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title Omitted in Printing)

[Filed August 23, 1986]

ORDER

Before: JONES and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge

This matter is before the Court upon consideration of appellant's response to this Court's order to show cause why the appeal should not be dismissed for lack of jurisdiction because of a late filed notice of appeal.

Appellant in his supplemental response suggests that *Fallen v. United States*, 378 U.S. 139 (1964), requires a remand to the district court for a determination of excusable neglect. It appears that the appointment of counsel would be a substantial benefit to the appellant and to the Court. Appointed counsel is requested as one of the issues to be briefed, to brief the question of whether *Fallen, supra*, applies to the instant appeal.

It is ORDERED that the jurisdictional issue be referred to the panel that will hear the case on the merits. It is further ORDERED that counsel be appointed to represent the appellant.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title Omitted in Printing)

[Filed January 27, 1987]

MOTION FOR LATE FILING OF BRIEF

Come now the appellees and move this Court to accept the filing of the appellees' brief as of the date filed. In support of this motion, the appellees would show that on January 16, 1987, ten copies of the appellees' brief were mailed to the Office of the Clerk of this Court with sufficient time and with sufficient postage thereon to reach the Office for filing on or before the January 19, 1987, due date. The Clerk has advised that as of January 23, 1987, the briefs had not been received. The appellees cannot account for the failure of the documents to reach the Clerk's Office and must conclude that the documents have been misplaced in the mail. The appellees tender herewith ten additional copies of the brief.

WHEREFORE, premises considered, the appellees respectfully request the Court to accept the filing of the appellees' brief as of the date filed.

Respectfully submitted,

W. J. MICHAEL CODY
Attorney General & Reporter

/s/ Gordon W. Smith
GORDON W. SMITH
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6439

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title Omitted in Printing)

[Filed May 22, 1987]

ORDER

Before: JONES and RYAN, Circuit Judges, and CELEBREZZE, Senior Circuit Judge

This cause having come before the court upon the briefs of the parties, the record of district court proceedings, and the argument of counsel;

For the reasons stated in open court we have determined that the court is without jurisdiction to entertain the appeal. It is therefore

ORDERED that the case is hereby dismissed for want of jurisdiction; Rule 9(b)(1), Rules of the Sixth Circuit.

ENTERED BY ORDER
OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ Leonard Green
LEONARD GREEN
Chief Deputy Clerk

Issued as Mandate: 7/21/87

Cost: none

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Title Omitted in Printing)

[Filed July 10, 1987]

ORDER

Before: JONES and RYAN, Circuit Judges, and CELEBREZZE, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

SUPREME COURT OF THE UNITED STATES

No. 87-5428

PRENTISS HOUSTON,
Petitioner

v.

LARRY LACK, Warden

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 19, 1988

Supreme Court, U.S.
FILED
FEB 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PRENTISS HOUSTON

Petitioner,

v.

LARRY LACK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

PETITIONER'S BRIEF ON THE MERITS

PENNY J. WHITE
(Appointed by this Court)
207 East Unaka Avenue
Johnson City, TN 37601
(615) 928-6005

Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED FOR REVIEW

Did the court of appeals err in holding that it lacked jurisdiction to hear a *pro se* prisoner's appeal from dismissal of his petition for habeas corpus when he gave his notice of appeal to prison authorities for mailing twenty-seven days after entry of the district court judgment but the notice was not marked filed by the clerk's office until the thirty-first day?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PRIOR OPINIONS	1
STATEMENT OF JURISDICTIONAL GROUNDS	1
RELEVANT STATUTE AND RULES	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	10
CONCLUSION	32

TABLE OF AUTHORITIES

Cases	Page
UNITED STATES SUPREME COURT:	
Browder v. *Director, Dep't of Corrections of Illinois*, 434 U.S. 257 (1978)	6
Chessman v. *Teets*, 354 U.S. 156 (1957)	13, 31
Coppedge v. *United States*, 369 U.S. 438 (1962)	13, 15
Darr v. *Burford*, 339 U.S. 200 (1950)	9, 20
Enmund v. *Florida*, 458 U.S. 782 (1982)	3
Ex Parte Tom Tong, 108 U.S. 826 (1883)	31
Fallen v. *United States*, 378 U.S. 139 (1964)	5, 7, 10-15
Haines v. *Kerner*, 404 U.S. 519 (1972)	31
Harris v. *Nelson*, 394 U.S. 286 (1969)	9, 31
Harris Truck Lines, Inc., v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962)	8, 21, 22
Holiday v. *Johnston*, 313 U.S. 342 (1941)	9, 31
Parissi v. *Telechron, Inc.*, 349 U.S. 46 (1955)	19
Price v. *Johnston*, 334 U.S. 266 (1948)	9
Rosenbloom v. *United States*, 355 U.S. 80 (1957)	22
Thompson v. *Immigration & Naturalization Services*, 375 U.S. 384 (1964)	8, 23
United States v. *Robinson*, 361 U.S. 220 (1960)	10
Wolfsohn v. *Hankin*, 376 U.S. 203 (1964)	8, 23
FEDERAL CASES:	
Belton v. *United States*, 259 F.2d 811 (D.C. Cir. 1958)	16
Campbell v. *White*, 721 F.2d 644 (8th Cir. 1983)	9, 30
Chipser v. *Kohlmeyer & Co.*, 600 F.2d 1061 (5th Cir. 1979)	24
Craig v. *Garrison*, 549 F.2d 306 (4th Cir. 1977)	26
Da'Ville v. *Wise*, 470 F.2d 1364 (5th Cir.), *cert. denied*, 414 U.S. 818 (1973)	8, 19, 21
Doctor v. *Seaboard Coast Line R.R. Co.*, 540 F.2d 699 (4th Cir. 1976)	25
Evans v. *Jones*, 366 F.2d 772 (4th Cir. 1966)	25, 27
Fallen v. *United States*, 306 F.2d 697 (5th Cir. 1962), *rev'd*, 378 U.S. 139 (1964)	12
Fearon v. *Henderson*, 756 F.2d 267 (2d Cir. 1985)	29
Halfen v. *United States*, 324 F.2d 52 (10th Cir. 1963)	11, 14
Hegler v. *Board of Educ.*, 447 F.2d 1078 (8th Cir. 1971)	19

Table of Authorities Continued

Cases — Page

Houston v. *Lack*, No. 86-5198 (6th Cir. May 22, 1987) (unpublished opinion, disposition at 819 F.2d 289) (6th Cir. 1987) 5, 6
In re Estate of Butler's Tire & Battery Co., Inc., 592 F.2d 1028 (9th Cir. 1979) 24
In re Orbitec Corp., 520 F.2d 358 (2d Cir. 1975) 27, 38
Jordan v. *United States District Court for the District of Columbia*, 233 F.2d 362 (D.C. Cir. 1956) 16
Lieberman v. *Gulf Oil Corp.*, 315 F.2d 403 (2d Cir. 1963) 24
Mayfield v. *United States Parole Comm'n*, 647 F.2d 1053 (10th Cir. 1981) 28
Moorer v. *Griffin*, 575 F.2d 87 (6th Cir. 1978) 26
O'Neal v. *United States*, 272 F.2d 412 (5th Cir. 1959) ... 15
Pryor v. *Marshall*, 711 F.2d 63 (6th Cir. 1983) 9, 28, 30
Reed v. *Michigan*, 398 F.2d 800 (6th Cir. 1968) 26
Richey v. *Wilkins*, 335 F.2d 1 (2d Cir. 1964) 11
Riffle v. *United States*, 299 F.2d 802 (5th Cir. 1962) 11
Rothman v. *United States*, 508 F.2d 648 (3d Cir. 1975) 15, 29
Sanchez v. *Board of Regents*, 625 F.2d 521 (5th Cir. 1980) 28
Shah v. *hutto*, 704 F.2d 717, *rev'd* en banc, 722 F.2d 1167 (4th Cir. 1983) *cert. denied*, 466 U.S. 975 (1984) 9, 28, 29
Silverton v. *Valley Transit Cement Co. Inc.*, 237 F.2d 143 (9th Cir. 1956) 20, 21
Stirling v. *Chemical Bank*, 511 F.2d 1030 (2d Cir. 1975) 29
Tillman v. *United States*, 268 F.2d 422 (5th Cir. 1959) .. 16
United Artists Corp. v. *La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985) 15
United States v. *Lucas*, 597 F.2d 243 (10th Cir. 1979) 9, 25, 30
United States v. *Preston*, 352 F.2d 352 (9th Cir. 1965). 20, 21
United States v. *Shillingford*, 568 F.2d 1106 (5th Cir. 1978) 26
United States v. *Solly*, 545 F.2d 874 (3d Cir. 1976) .. 8, 20, 21
Ward v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir. 1959), *rev'd on other grounds*, 362 U.S. 396 (1960) 8, 18, 21
Wallace v. *United States*, 174 F.2d 112 (8th Cir.), *cert. denied*, 337 U.S. 947 (1949) 13, 14

Table of Authorities Continued

Page

Williams v. *United States*, 188 F.2d 41 (D.C. Cir. 1951) 13, 14, 16
Willis v. *Newsome*, 747 F.2d 605 (11th Cir. 1984), *cert. denied*, 475 U.S. 1050 (1986) 23
Houston v. *Lack*, 625 F.Supp. 786 (W.D. Tenn. 1986) 1, 5

STATUTES:
28 U.S.C. § 2253 ..... 1, 7
28 U.S.C. § 2254 4
28 U.S.C. § 2255 15
Tenn. Code Ann. §§ 40-38-301 to -303 3

RULES:
Fed. R. App. P. 3 ..... 1, 10, 16
Fed. R. App. P. 4 ..... 1, 5, 6, 10, 11, 17, 25, 26, 28, 32
Fed. R. App. P. 5 17
Fed. R. Civ. P.5(e), 28 U.S.C. app. (1964) 11
Fed. R. Civ. P. 7 3
Fed. R. Civ. P. 73, 28 U.S.C. app. (1964) 11, 22
Fed. R. Crim. P. 2 13
Fed. R. Crim. P. 37, 18 U.S.C. app. (1964) 11

SECONDARY AUTHORITY:
J. Moore, B. Ward, and J. Lucas, 9 Moore's Federal Practice (2d ed. 1987) 12, 17, 27, 29
Fed. R. App. P. 3 & 4 advisory committee's note 10, 12

PRIOR OPINIONS

The relevant prior opinions in this matter of the United States District Court for the Western District of Tennessee, Eastern Division, and the United States Court of Appeals for the Sixth Circuit are presented in the joint appendix. J.A. 2, 31. The decision on the merits of the United States District Court for the Western District of Tennessee, Eastern Division is reported at 625 F.Supp 786 (W.D. Tenn. 1986). The decision of the United States Court of Appeals for the Sixth Circuit is unpublished, but the disposition is reported at 819 F.2d 289 (6th Cir. 1987).

STATEMENT OF JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit dismissed Houston's appeal from the denial of his petition for habeas corpus on May 22, 1987. The Sixth Circuit denied the petition for rehearing en banc on July 10, 1987, and mandated that order on July 21, 1987. On September 8, 1987, the petitioner filed a petition for writ of certiorari based upon 28 U.S.C. Section 2101(c) and a motion for leave to proceed *in forma pauperis*. On January 19, 1988, this Court granted the petition for writ of certiorari and motion for leave to proceed *in forma pauperis*.

RELEVANT STATUTE AND RULES

28 U.S.C. § 2253

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

* * *

Federal Rules of Appellate Procedure, Rule 3(a)

Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

* * *

Federal Rules of Appellate Procedure, Rule 4(a)(1) & (5)

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

* * *

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is

filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, which every occurs later.

* * *

Federal Rule of Civil Procedure, Rule 7(b)

(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signings, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

STATEMENT OF THE CASE

Prentiss Houston was indicted by an Obion County, Tennessee grand jury on October 11, 1982, for first degree murder. On November 15, 1982, after being informed that the State would seek the death penalty, Houston entered a guilty plea to second degree murder and received a fifty year sentence as a range two offender. At that time Houston was not eligible for the death penalty under the holding in *Enmund* v. *Florida*, 458 U.S. 782 (1982).

Although Houston was sentenced pursuant to the Tennessee Class X felony law, Tenn. Code Ann. §§ 40-38-301

to -303 (1982 Kepl.) (repealed 1985 Tenn. Pub. Acts (1st E.S.) CL.5 § 7), which has significant repercussions for an inmate, neither, the trial judge nor his trial counsel explained to him the nature of his conviction or the direct consequences of his plea. Following the exhaustion of his state remedies, Houston filed a pro se petition under 28 U.S.C. § 2254 for a writ of habeas corpus in the United States District Court for the Western District of Tennessee, Eastern Division. That court dismissed the petition by written opinion on January 6, 1986, without either appointing counsel or conducting an evidentiary hearing. The judgment dismissing the petition was entered on January 7, 1986. J.A. 19; *Houston* v. *Lack*, 625 F.Supp. 786 (W.D. Tenn. 1986).

In January 1986, Houston had no access to legal materials as a result of the destruction of the materials during a disturbance at the Turney Center in Only, Tennessee where he was incarcerated. Additionally, during this time Houston was transferred to another institution, Lake County Regional Correctional Facility, where he spent time in a mandatory orientation program. Thereafter, Houston, still proceeding *pro se*, drafted and presented to his custodians a notice of appeal, on February 3, 1986. Houston attempted to receive a stamp-filed copy of his Notice and to use faster mail service but was disallowed those opportunities due to his indigency. The notice of appeal was marked "filed" by the district court at 8:30 a.m. on February 7, 1986, one day beyond the thirty-day filing period as established in Rule 4(a)(1) of the Federal Rules of Appellate Procedure. J.A. 21.

Houston was not notified of the lateness of his notice of appeal, so he did not file a motion for extension of time as allowed by Federal Rules of Appellate Procedure 4(a)(5). He did, however, request a certificate of probable cause on

February 19, 1986, and designate record portions on February 27, 1986, further evidencing his reliance upon his perfection of the notice of appeal.

On February 18, 1986, the district court filed and transmitted copies of its certificate of probable cause to Houston. That certificate noted that Houston's petition had presented "a question of first impression" in the jurisdiction. J.A. 22. On March 5,1986, the United States Court of Appeals for the Sixth Circuit circulated to Houston a briefing schedule. It was not until March 21, 1986, 13 days after the time had expired for Houston to request an extension of time within which to file his notice of appeal, Fed. R. App. P. 4(a)(5), that Houston was first notified of the untimeliness of his notice of appeal.

On March 21, 1986, the United States Court of Appeals for the Sixth Circuit entered an order requiring Houston to "show cause in writing not later than 21 days from the file date of this order why the appeal should not be dismissed for lack of jurisdiction." J.A. 21. Within that time, Houston, still proceeding *pro se*, filed a response headed "Cause for Delay" in which he detailed the many reasons which delayed his notice of appeal and attached documentary evidence. J.A. 26. Thereafter, Houston filed a supplement which requested that the court retain jurisdiction under the provisions of Federal Rules of Appellate Procedure 3 and 4 and the authority of *Fallen* v. *United States*, 378 U.S. 139 (1964). J.A. 28. On August 23, 1986, the Sixth Circuit Court of Appeals appointed counsel and directed that the jurisdictional issue be addressed. No ruling was made on Houston's attempt to show cause for the delay.

Following the filing of briefs by Houston and the State of Tennessee, the Sixth Circuit scheduled oral argument.

At the argument the court dismissed the appeal from the bench pursuant to Rule 19 of the Sixth Circuit Rules. An order of dismissal was entered on May 22, 1987. J.A. 31. A timely petition for rehearing en banc was filed but denied by the United States Court of Appeals For the Sixth Circuit on July 10, 1987. J.A. 32. From that denial, a writ of certiorari was sought by Houston on September 8, 1987, and granted on January 19, 1988.

SUMMARY OF ARGUMENT

Rule 4(a)(1) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed "within 30 days after the date of entry of the judgment or order appealed from." Subsection (a)(5) allows the district court to extend this time for excusable neglect or good cause upon motion made within thirty days following expiration of the time for appeal. Such an extension may not exceed the latter of the expiration of the second thirty days or ten days after entry of the order granting an extension. The filing of a notice of appeal within the original thirty days or within such time as extended by motion and order is mandatory and jurisdictional. *Browder* v. *Director, Dep't of Corrections of Illinois*, 434 U.S. 257 (1978).

In this case, Petitioner Prentiss Houston, acting *pro se*, delivered his notice of appeal to prison authorities for mailing twenty-seven days after entry of the order dismissing his petition for a writ of habeas corpus on January 7, 1986. Although Houston requested that the notice be sent by air mail, the prison authorities refused since Houston was unable to pay the air mail postage. His notice of appeal was stamped filed by the district court clerk at 8:30 a.m. on February 7, 1986, the thirty-first day after entry of the order dismissing the appeal. Within the thirty days following expiration of the initial thirty day

appeal period, Houston applied for and was granted a certificate of probable cause under 28 U.S.C. § 2253 and received a briefing schedule from the clerk of the United States Court of Appeals for the Sixth Circuit. He also designated record portions for the appeal. Not until March 21, 1986, thirteen days after the expiration of the second thirty day period, was Houston apprised of any question as to the timeliness of his appeal.

This Court recognized in *Fallen* v. *United States*, 378 U.S. 139 (1964), that "the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Id.* at 142. In *Fallen*, an unrepresented inmate who was handicapped, ill at the time of his conviction and thereafter, and who had been transferred to the penitentiary shortly after his motion for new trial had been denied, gave his notice of appeal to prison authorities for mailing in time for it to reach the clerk's office within the time allowed for appeal. The notice, however, arrived four days after expiration of the appeal period. This Court held that, "[s]ince petitioner did all he could do under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits." *Id.* at 144. Here, Houston was incarcerated at a prison whose law library was destroyed in a riot, locked down as a result of the riot, and transferred to a different state prison during the initial thirty day appeal period. Despite these obstacles, the *pro se* petitioner managed to prepare a notice of appeal and present it to prison authorities for mailing twenty-seven days after judgment. His request to send it air mail was denied due to his inability to pay postage. Under these circumstances, Houston "had done all that could reasonably be expected to get the letter to its destination within the required [thirty] days," *id.* at 144, and his appeal was timely under *Fallen*.

In addition, it appears that there is a substantial likelihood that Houston's notice of appeal may actually have been received in the clerk's office prior to February 7. His notice of appeal is marked filed at 8:30 a.m. on that day, as are all other papers filed by Houston with the clerk of the United States District Court for the Western District of Tennessee in Jackson. Since the clerk's mailing address is a post office box, it appears to be possible that Houston's notice may actually have been in the Clerk's custody on February 6 but not stamped filed until the morning of the following day. Since, as the Fifth Circuit held in *Ward* v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir. 1959), *rev'd on other grounds*, 362 U.S. 396 (1960), it is receipt rather than filing that determines timeliness, the court of appeals should have at least remanded for a determination of when the notice was actually received before dismissing the appeal. *See United States* v. *Solly*, 545 F.2d 874 (3d Cir. 1976); *Da'Ville* v. *Wise*, 470 F.2d 1364 (5th Cir.), *cert denied*, 414 U.S. 818 (1973).

This Court has also recognized certain "unique circumstances" that justify an expansive reading of the formalities for perfecting an appeal. In *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), the Court held that a party who had reasonably relied on the district court's erroneous grant of an extension of time to appeal had made "a showing of unique circumstances" that rendered its appeal timely. *Id.* at 217. Similarly, in *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384 (1964), and *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964), the Court found unique circumstances when the appellants had reasonably relied on the trial court's actions in perfecting their appeals. In this case, Houston reasonably relied upon the district court's grant of a certificate of probable cause and the court of appeal's issuance

of a briefing schedule as indications that his appeal was timely. Both of these actions took place during the time in which Houston could have filed a motion for extension and shown excusable neglect to save his appeal rights. These are precisely the sort of unique circumstances recognized in *Harris*, *Thompson*, and *Wolfsohn*, and Houston's appeal should have been considered on the merits by the court of appeals.

Finally, Houston's late-filed notice of appeal may itself be considered a motion for extension under Rule 4(a). Although a common practice prior to 1979, the courts of appeal have abandoned this approach since the 1979 amendments to Rule 4(a). *See Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984). These decisions, however, fail to pay proper deference to the role of the writ of habeas corpus as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969). These decisions are also inconsistent with the leniency with which this Court has applied rules of practice and pleading to *pro se* petitioners. *See Darr* v. *Burford*, 339 U.S. 200, 203-04 (1950); *Price* v. *Johnston*, 334 U.S. 266, 269 (1948); *Holiday* v. *Johnson*, 313 U.S. 342, 350 (1941). In similar situations at least two circuits have suggested or required that the clerk's office screen notices of appeals and notify *pro se* litigants of the necessity of filing a motion for extension of time. *Campbell* v. *White*, 721 F.2d 644 (8th Cir. 1983); *United States* v. *Lucas*, 597 F.2d 243 (10th Cir. 1979). While the Sixth Circuit noted the desirability of such a rule, *Pryor* v. *Marshall*, 711 F.2d 63 (6th Cir. 1983), it was not adhered to in Houston's case. Given the unique role of the writ as the key to the prison door for citizens illegally confined, and its unique procedures, *Harris* v. *Nelson*, 394 U.S. at

294-95, a *pro se* habeas corpus petitioner's late-filed notice of appeal should be treated as a motion for extension if filed within the time allowed by Rule 4(a)(5).

ARGUMENT

A. Houston's Notice Of Appeal Was Timely Filed Under *Fallen* v. *United States*, 378 U.S. 139 (1964).

The Federal Rules of Appellate Procedure require the filing of a "notice of appeal with the clerk of the district court within the time allowed by Rule 4" in order to appeal a decision of a district court. Fed. R. App. P. 3(a). The "time allowed by Rule 4" is "30 days after the date of entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1). In the case at bar the United States District Court for the Western District of Tennessee entered its order dismissing Houston's petition for writ of habeas corpus on January 7, 1986. J.A. 19. On the twenty-seventh day after that order was entered, Houston deposited with his custodian for mailing a notice of appeal. That notice, according to the file stamp of the district court, was filed at 8:30 a.m. on February 7, 1986, or one day after the expiration of the time allowed in Rule 4(a)(1).

While it is true that the timely filing of a notice of appeal is jurisdictional, *United States* v. *Robinson*, 361 U.S. 220, 224 (1960), technical compliance with Rules 3 and 4 may be excused when it cannot "fairly be exacted." Fed. R. App. P.3 advisory committee note. The rules themselves allow the court to assist the litigants in rectifying mistakes when their notice if filed too early, Fed. R. App. P.4(a)(2)("shall be treated as filed after [entry of the judgment or order] and on the day thereof."); in the wrong court, Fed. R. App. P.4(a)(1) (transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date [it was received by the appellate clerk"]); or too

late, Fed. R. App. P.4(a)(5) ("upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal . . . ."). This flexibility reflects the policy of the rules to ensure justice without slavish regard to formality.

A liberal and flexible view of the notice of appeal requirements is particularly relevant to *pro se* litigants who are unskilled and untrained in the law. The advisory committee notes support such a construction with regard to Rule 3 and late-filed notices of appeal. Fed. R. App. P.3 advisory committee note. The committee cited four cases, all but one of which dealt with treating late-filed notices as timely under particular circumstances. *Fallen* v. *United States*, 378 U.S. 139 (1964); *Richey* v. *Wilkins*, 335 F.2d 1 (2nd Cir. 1964); *Halfen* v. *United States*, 324 F.2d 52 (10th Cir. 1963); *Riffle* v. *United States*, 299 F.2d 802 (5th Cir. 1962).

Rule 4(a)(5) of the Federal Rules of Appellate Procedure addresses the procedure by which a litigant can preserve his right to appeal after the expiration of the thirty-day appeal period. The rule allows the district court to "extend the time for filing a notice of appeal" if the litigant makes a showing of "excusable neglect or good cause." Fed R. App. P.4(a)(5). The rule, as amended in 1979, provides that the extension may be granted "upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." *Id.* The motion for extension of time may be filed *ex parte* before the expiration of the time period but notice must be given to all parties if the notice is filed after the expiration of the time period. *Id.*

The Rule itself is derived from former Rules 5(e) and 73 of the Federal Rules of Civil Procedure and Rule 37 of the

Federal Rules of Criminal Procedure. Fed. R. App. P.3 advisory committee note. J. Moore, B. Ward, & J. Lucas, 9 Moore's Federal Practice Rules 3 and 4 ¶ 204.01 (2d ed. 1987). Since Rules 3 and 4 "merely restate" their predecessors, decisions under the former rules are equally applicable to Rules 3 and 4. *Id.* Consequently those decisions under the former civil and criminal procedure rules which "dispense with literal compliance" with the rules apply to situations arising under the successor rules. *Id.*

The decision cited by the advisory committee and most parallel to this case arose under former rule 37(a)(2) of the Federal Rules of Criminal Procedure but is emphasized by the committee as equally controlling in rule 3 and 4 cases. In *Fallen* v. *United States*, 378 U.S. 139 (1964), an indigent defendant attempted to appeal his criminal conviction and sentence within the time allowed by former-rule 37(a)(2) of the Federal Rules of Criminal Procedure. Although Fallen had been represented at trial by counsel, and had inquired about his right to appeal "as an insolvent," 378 U.S. at 140, his attorney withdrew immediately after sentencing and Fallen was left to accomplish his appeal *pro se*.

One day following his sentencing, on January 16, Fallen, who was paraplegic and also suffering from influenza, was returned to a hospital in Atlanta, where he was not allowed visitors. Presumably on January 23, Fallen wrote letters requesting a new trial and an appeal but those letters were not received by the clerk's office until January 29, four days after the time period prescribed in rule 37(a)(2) had expired.

The lower court appointed counsel to argue Fallen's motion for new trial but never decided the issue of the timeliness of the appeal. Upon the government's motion,

the United States Court of Appeals for the Fifth Circuit dismissed the appeal as being untimely filed. *Fallen* v. *United States*, 306 F.2d 697 (5th Cir. 1962), *rev'd*, 378 U.S. 139 (1964). In its opinion, the Fifth Circuit recognized that other jurisdictions applied "a more liberal rule," 306 F.2d at 703, (citing *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951); *Wallace* v. *United States*, 174 F.2d 112 (8th Cir., *cert. denied*, 337 U.S. 947 (1949); and that the presence of constitutional issues might require consideration of a belated appeal. *Id.* at 703 (citing *Chessman* v. *Teets*, 354 U.S. 156 (1957)). Under the circumstances, however, the court held that Fallen's timely mailing was not timely filing. Judge Rives, in his dissent, noted that this Court had recently approved the application rejected by the Fifth Circuit majority. *See Coppedge* v. *United States*, 369 U.S. 438, 442 n.5 (1962)(citing *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951)), and had required liberality in viewing papers filed by "indigent and incarcerated defendants as equivalents of notices of appeal . . . to preserve the jurisdiction of the Courts of Appeals." 369 U.S. at 442 n.5.

This Court granted certiorari, *Fallen* v. *United States*, 374 U.S. 826 (1964), and reversed the Fifth Circuit's dismissal of Fallen's appeal. 378 U.S. 139 (1964). "Overlooked, in our view was the fact that the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." 378 U.S. at 142. While it is true that the Court mentioned the "admonition" of fairness set out in rule 2 of the Federal Rules of Criminal Procedure as one basis for its decision, it also emphasized Fallen's appearance without counsel, his transfer, his lack of legal training, his lack of access to legal materials, and his timely mailing. The Court found "no reason on the basis of what this record discloses to

doubt that petitioner's date at the top of the letter was an accurate one and that subsequent delays were not chargeable to him." *Id.* at 143-44. The Court thus concluded that "[s]ince petitioner did all he could under the circumstances, we decline to read the Rules so rigidly as to bar a determination of his appeal on the merits." *Id.* at 144.

Justices Stewart, Harlan, Clark and Brennan, in the concurring opinion, suggested that "in such a case, the jailer is in effect the clerk of the District Court . . . ." *Id.* at 144. While it might be necessary in some cases to remand for a determination of the date of delivery, the government had conceded that Fallen delivered his notice of appeal to prison authorities for mailing within the time period allowed.

The flexibility and fairness of *Fallen* has been demonstrated in lower court cases some of which precede and others which follow this Court's opinion in *Fallen*. In *Halfen* v. *United States*, 324 F.2d 52 (10th Cir. 1963), the Tenth Circuit permitted an untimely appeal to proceed when the notice of appeal had been mailed in time to be timely received although it was not. In *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951), a one-day late notice of appeal was deemed timely when "the communication was prepared in time, and the petitioner did all he could do to have it delivered to the clerk . . . in time." *Id.* at 42. The petitioner had given the deputy his notice on the seventh day but the clerk had not received it until the eleventh day. In *Wallace* v. *United States*, 174 F.2d 112 (8th Cir., *cert. denied*, 337 U.S. 947 (1949), a notice of appeal dated June 8 did not arrive until June 23, for a number of reasons. The court allowed the appeal notwithstanding the lateness "[i]n view of his incarceration and his conceded efforts to take an immediate appeal. . . ."

Id. at 114. In *Rothman* v. *United States*, 508 F.2d 648 (3rd Cir. 1975), an order was entered denying a 28 U.S.C. Section 2255 motion on November 8, 1973. This inmate dated a notice of appeal on January 4, 1974, but the notice was not received until January 17, 1974. Because it was not accompanied by the appropriate fees, the notice was not docketed until January 30, 1974. On appeal, the Court held that since the letter mailed on January 4 would have been received ordinarily by the January 7 deadline, the notice might be deemed timely. However, because the notarization of the notice of appeal bore the date January 10, 1974, thus rebutting the *Fallen* majority's presumption that the document was mailed on the date recorded, remand was necessary to determine if the prisoner filed his notice within the time prescribed by *Fallen*.

Fallen, its forebearers and its progeny, recognize that an inmate, because of his confinement, is oftentimes rendered helpless in his attempt to comply with the procedural requirements of the rules. When, as Fallen, the *pro se* litigant does all that he can do to perfect a timely appeal, the flexibility required by the rules should treat the notice of appeal as timely. As this Court has generally recognized "it is [the Court's] duty to assure to the greatest degree possible, within the statutory framework for appeals created by Congress, equal treatment for every litigant before the bar." *Coppedge* v. *United States*, 369 U.S. 438, 446-47 (1962) (footnote which recognizes statistics proving no greater chance of frivolous appeal by *pro se* litigant omitted). "A liberal view of papers filed by indigent and incarcerated defendants," *id.* at 422 n.5, must be taken particularly when the litigant's *pro se* position has already caused disadvantages. *Id.* (citing *Lemke* v. *United States*, 346 U.S. 325 (1963) (premature notice of appeal deemed timely)); *O'Neal* v. *United States*, 272 F.2d

412 (5th Cir. 1959) (appeal bond accepted as notice of appeal); *Tillman* v. *United States*, 268 F.2d 422 (5th Cir. 1959) (petition for leave to appeal in forma pauperis sufficient to constitute notice of appeal); *Belton* v. *United States*, 259 F.2d 811 (D.C. Cir. 1958) (letter received before judgment and appearance in brief and by oral argument constitutes notice of appeal); *Williams* v. *United States*, 188 F.2d 41 (D.C. Cir. 1951) (notice of appeal delivered to deputy within time period though arrived after expiration was timely); *Jordan* v. *United States District Court for the District of Columbia*, 233 F.2d 362 (D.C. Cir. 1956) (petition for mandamus deemed notice of appeal).

Herein Houston, at the mercy of his custodians, delivered his notice of appeal for mailing on February 3, 1986. J.A. 28. His preparation was hampered by his lack of counsel, his lack of legal training, the absence of legal materials due to a riot, his transfer to a new facility, and the regimen he had to follow daily. J.A. 26. Notwithstanding these significant barriers, Houston managed to prepare a notice of appeal which met the requirements of Rule 3. J.A. 21. He obviously desired to appeal the decision of the district court which was rendered without a hearing. Additionally, he managed to deliver the document to his custodian within sufficient time for it to arrive at the district court. J.A. 28. Although he contemplated attempting a speedier mail service, Houston's poverty prevented him from securing a more reliable delivery service. J.A. 26.

Within days of the delivery of his notice of appeal Houston requested and received a certificate of probable cause, J.A. 1, designated the portions of the record for appeal, J.A. 1, and received his briefing schedule. Only after the time provided in the rules for the filing of a

motion for extension had expired, Fed. R. App. P.4(a)(5), did Houston, still *pro se*, learn that his notice had been untimely filed. Under these circumstances Houston did all that he could do. His appeal should not be denied because he failed to meet the strict requirements of the rule.

B. The Court Of Appeals Erred In Holding That It Lacked Jurisdiction When There Is A Strong Possibility That Houston's Notice Of Appeal May Have Been Received Within Thirty Days Of Entry Of The Order Dismissing His Petition.

Petitioner Houston's notice of appeal from the district court's order of January 7, 1986, dismissing his petition for writ of habeas corpus was stamped filed at 8:30 a.m. on February 8, 1986. If the clerk's notation of filing was final, this might well be the end of Houston's appeal rights. The courts of appeals, however, have not applied such a Draconian rule; rather, they have been willing to go behind the clerk's notation to discover if the notice was actually received during the thirty day appeal period. *See* J. Moore, B. Ward, and J. Lucas, 9 Moore's Federal Practice ¶ 203.10 (2d ed. 1987). The court of appeals erred in this case by failing to inquire into the time Houston's notice of appeal was actually received by the clerk's office.

A review of the record discloses that the majority of the filings by both parties in the District Court were stamped filed at 8:30 a.m. Houston's petition under 28 U.S.C. Section 2254 was marked filed at 8:30 a.m. on May 15, 1985. His supporting brief was apparently mailed from Only, Tennessee, on June 13, 1985, and stamped received by the clerk's office in Jackson, approximately seventy miles from Only, *see* Rand-McNally Standard Highway Mileage Guide 444 (1973); 1987 Rand-McNally Commercial Atlas and Marketing Guide 226 (118th ed. 1987), at

8:30 a.m. on June 18, 1985. The answer filed on behalf of Warden Lack by the Tennessee Attorney General's office was mailed from Nashville on November 8, 1985, and stamped filed at Jackson, a distance of one hundred twenty-six miles from Nashville, *see* Rand-McNally Standard Highway Mileage Guide 227 (1973), at 8:30 a.m. on November 13, 1985. Houston's response brief was mailed from Only on November 15, 1985, and stamped filed in Jackson at 8:30 a.m. on November 19, 1985. His motion for permission to copy transcripts was mailed from Only on December 11, 1985, and stamped filed at 8:00 a.m. on December 13, 1985. Six days after the District Court dismissed his petition, Houston was transferred from the Turney Center at Only to the Lake County Regional Correctional Facility at Tiptonville, Tennessee. *See* J.A. ___. His notice of appeal and brief were mailed from there on February 3, 1986, but were not filed in Jackson, a distance of approximately eighty-one miles, *see* Rand-McNally Standard Highway Mileage Guide 444 (1973), until 8:30 a.m. on February 7, 1986,—the thirty-first day following entry of the order of dismissal. Since the Western District's clerk uses a post office box as his mailing address, it appears possible that the custom may be to file all papers received by mail at the start of each day. If this is the case, then it is equally possible that Houston's notice of appeal may have actually been received on February 6, the thirtieth day, but not filed by the clerk until the next morning. If so, Houston's appeal was timely.

The Court of Appeals for the Fifth Circuit was faced with an ambiguous situation in *Ward* v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir. 1959), *rev'd. on other grounds*, 362 U.S. 396 (1960). In that case, the plaintiff had appealed from judgment entered on a jury verdict for the defendant in a Federal Employer's Liability Act case

on December 5, 1957. Plaintiff's counsel mailed a notice of appeal via air mail on January 2, 1958. Since the clerk's office was closed on January 2 and 3, and the following two days were a Saturday and Sunday, the notice was not marked as filed until January 6, the thirty-first day following entry of judgment. The court of appeals found that the notice was in the clerk's custody within thirty days and that the appeal was, therefore, timely. This result was based on the Fifth Circuit's conclusion that "[i]t is the time when the clerk receives actual custody of the notice which determines whether this court has jurisdiction over the appeal, and under circumstances such as are present in this case, the notice may be received in the clerk's custody and control even though it has not yet been manually handled and marked 'filed' by the clerk or his deputy." *Id.* at 81. Although this Court reversed on the grounds that the district court's jury instructions were unduly restrictive, 362 U.S. 396 (1960), *Ward* has come to stand for the proposition that it is receipt rather than filing of a notice that determines the timeliness of an appeal. *Cf. Parissi* v. *Telechron, Inc.*, 349 U.S. 46 (1955) (appeal is timely if notice received within thirty days notwithstanding lack of required filing fee).

The *Ward* principle has been applied in similar cases in which the circumstances suggested that the clerk may have received the notice earlier than the filing date noted on the document. In *Hegler* v. *Board of Educ.*, 447 F.2d 1078 (8th Cir. 1971), the Eight Circuit Court of Appeals found that when the clerk was on leave on August 26 through 28 and the appellee's counsel, whose office was located in the same town as the clerk's, received his service copy of the notice on August 28, the appellant was entitled to a presumption that the clerk had received the notice of August 28, the thirtieth day. In *Da'Ville* v. *Wise*,

470 F.2d 1364 (5th Cir., *cert. denied*, 414 U.S. 818 1973), the Fifth Circuit Court of Appeals found that there was a "strong possibility" that appellant's notice was received within the time allowed but, due to district court operating procedures, not marked filed until after the thirtieth day. *Id.* at 1365. Under those circumstances, the court of appeals held that the appellee had failed to carry its burden of showing that the appeal was untimely. *Id.*

Faced with a more ambiguous set of facts, the Court of Appeals for the Third Circuit, relying on *Da'Ville*, held in *United States* v. *Solly*, 545 F.2d 874 (3d Cir. 1976), "that whenever a notice of appeal is filed in a district court, it is filed as of the time it is actually received . . . even though it is designated as filed by the clerk's office at a later date." *Id.* at 876. Since it was unclear from the record when the notice was actually received, the court of appeals retained jurisdiction while remanding to the district court for an inquiry into the date of receipt. *Id.; see also Rothman* v. *United States*, 508 F.2d 648 (3d Cir. 1975).

In these and similar cases, *see, e.g., United States* v. *Preston*, 352 F.2d 352 (9th Cir. 1965); *Silverton* v. *Valley Transit Cement Co. Inc.*, 237 F.2d 143 (9th Cir. 1956), the courts of appeals have hesitated to dismiss appeals when it appeared that there was a possibility that the notice of appeal was actually received by the clerk prior to its formal filing. Given the drastic consequences of failing to satisfy the jurisdictional requirement of a timely notice, this solicitude is well warranted. In the case of *pro se* habeas corpus petitions filed by "unlettered prisoners without friends or funds," *Darr* v. *Burford*, 339 U.S. 200, 203 (1950), this hesitation to dismiss without a full inquiry should be even stronger. The Sixth Circuit, however, showed no such concern for Houston, even though, as discussed above, there are facts in the record that suggest

possible receipt of the notice on February 6. Regardless of whether the burden of proving the date of actual receipt lies with the appellant, *see United States* v. *Preston*, 352 F.2d 352 (9th Cir. 1965); *Ward* v. *Atlantic Coast Line R.R. Co.*, 265 F.2d 75 (5th Cir. 1959), *rev'd on other grounds*, 362 U.S. 396 (1960); *Silverton* v. *Valley Transit Cement Co. Inc.*, 237 F.2d 143 (9th Cir. 1956), or the appellee, *see Da'Ville* v. *Wise*, 470 F.2d 1364 (5th Cir., *cert. denied*, 414 U.S. 818 (1973), the court of appeals should be fully informed of the relevant jurisdictional facts before dismissing a *pro se* appeal. Since the facts before the court of appeals were ambiguous as to the date of actual receipt, remand to the district court for further inquiry would have been appropriate. *United States* v. *Solly*, 545 F.2d 874 (3d Cir. 1976). Dismissal of the appeal without this further inquiry was error and should be reversed.

C. The Court Of Appeals Erred In Dismissing The Appeal When There Were "Unique Circumstances" Under *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), In That Petitioner Relied Upon The Actions Of The District Court And Court Of Appeals As Assurance That His Appeal Was Timely.

In *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), this Court recognized that there were certain "unique circumstances" under which the otherwise untimely appeal of a party who had reasonably relied upon a court's express or implied assurances of timeliness could be saved. Although such cases are rare, they do fall within the jurisdiction of the courts of appeals. Since this case presents just such unique circumstances, the court of appeals possessed jurisdiction to hear the appeal even if Houston's notice of appeal was not properly filed within the original or extended thirty day periods.

As early as 1957, this Court recognized that a party who reasonably relied upon ambiguous actions of the dis-

trict court as assurance that an appeal filed at a certain time was timely should not be denied his right to appellate review. *Rosenbloom* v. *United States*, 355 U.S. 80 (1957). Five years after *Rosenbloom*, the Court articulated the basis upon which courts of appeals could exercise jurisdiction over apparently untimely appeals in *Harris Truck Lines, Inc.*, v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). In that case, the petitioner's counsel had requested a two week extension of the time to appeal under former Rule 73(a) of the Rules of Civil Procedure. The grounds given for the requested extension were that the client's general counsel, who was the only company representative with authority to decide whether to appeal, was vacationing in Mexico and therefore unavailable. The district court granted the extension and an appeal was perfected within the time allowed by the extension. The court of appeals dismissed the appeal due to petitioner's failure to show "excusable neglect based on a failure of a party to learn of the entry of the judgment," the only grounds for an extension under former Rule 73(a). This Court reversed, holding that

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling.

371 U.S. at 217. Clearly, the unique circumstances presented in *Harris Truck Lines* were the petitioner's failure to file its notice within the time allowed due to the trial court's assurance that one filed within the extended period would be timely.

A similar issue was presented in *Thompson* v. *Immigration & Naturalization Service*, 375 U.S. 384 (1964). There, a motion for new trial was filed twelve days after the judgment, and therefore failed to toll the running of the sixty day appeal period. The Immigration and Naturalization Service, however, made no objection to the motion and the trial judge stated that it was made "in ample time." *Id.* at 385. The petitioner filed a notice of appeal within sixty days of entry of the order denying a new trial but more than sixty days after entry of judgment denying the petition for naturalization. The court of appeals granted the Immigration and Naturalization Service's motion to dismiss the appeal on the grounds that the late motion for new trial had not tolled the sixty day appeal period and, since no notice was filed within sixty days of the judgment, it lack jurisdiction. This Court reversed on the authority of *Harris Truck Lines*, holding that the court of appeals had jurisdiction to hear an appeal when the district court leads an appellant to believe that an act tolling the running of the appeal period has been properly done and, in reliance upon that representation, the appellant who can still perfect a timely appeal does not file a notice of appeal within the original period. *Id.* at 386-87. In that same term, the Court reached the same result in a similar case from the Court of Appeals for the District of Columbia. *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964).

The courts of appeals have relied on *Harris Truck Lines*' unique circumstances rationale to preserve apparently untimely appeals when represented parties have foregone the steps necessary to perfect an appeal in reasonable reliance on acts of the trial court. *See, e.g. United Artists Corp.* v. *La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985); *Willis* v. *Newsome*, 747 F.2d 605 (11th Cir.

1984); *Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061 (5th Cir. 1979). Thus, in *Lieberman* v. *Gulf Oil Corp.*, 315 F.2d 403 (2d Cir. 1963), an original judgment was amended to delete two parties at the defendant's request on December 27. The plaintiff, whose counsel received notice of the amendment and tried successfully to see it on December 28, filed a notice of appeal more than thirty days after entry of the original judgment but less than thirty days after entry of the amended judgment. The court of appeals found that plaintiff's attorney "could not unreasonably have concluded" that the amendment was made under Rule 59(e), which would have restarted the appeal period, rather than under Rule 60(a), which did not. *Id.* at 406. Under these facts, the court of appeals held that *Harris Truck Lines* required that the appeal be heard on the merits.

The Court of Appeals for the Ninth Circuit reached a similar result in *In re Estate of Butler's Tire and Battery Co., Inc.*, 592 F.2d 1028 (9th Cir. 1979), an action by a bankruptcy trustee to subordinate the security interest of Ferrous Financial Service. Twenty days after the bankruptcy court entered its judgment, the appellant filed a request for extension of the time to appeal to district court. The oral argument on the motion for extension was scheduled after the expiration of the twenty day extension period allowed under bankruptcy rule 802 upon a showing of excusable neglect. The Bankruptcy Court granted the extension but the district court dismissed the appeal for untimeliness. The Ninth Circuit reversed, stating "[w]e conclude that Ferrous reasonably withheld filing of the notice of appeal until the court had ruled on the claim of excusable neglect and should not be penalized for relying upon the court's decision to calendar argument for a date beyond the applicable time limits." *Id.* at 1032

(footnote omitted). Thus, as in *Harris Truck Lines* and *Thompson*, the court recognized that reasonable reliance on the acts of a judge may preserve jurisdiction over an otherwise untimely appeal.

In this case, Houston's notice of appeal was stamped filed at 8:30 a.m. on February 7, 1986, the thirty-first day. At that point, he had twenty-nine days in which to move for an extension for excusable neglect under Rule 4(a)(5) of the Rules of Appellate Procedure. His response to the court of appeals' order to show cause of March 21, J.A. 26, indicates that he would have presented a strong case for such an extension. *See Doctor* v. *Seaboard Coast Line R.R. Co.*, 540 F.2d 699 (4th Cir. 1976) (mailed on twenty-ninth day, filed on thirty-first day); *Evans* v. *Jones*, 366 F.2d 772 (4th Cir. 1966) (mailed on twenty-eight day, filed on thirty-first day). The actions taken by the district court and court of appeals during the thirty days allowed for seeking an extension—the issuance of a certificate of probable cause and a briefing schedule—had the effect of lulling Houston into the mistaken belief that his notice of appeal had been timely received. And while it might not have been reasonable for a member of the bar to reach such a conclusion, Houston, who accurately described himself to the court of appeals as "a layman of the law, with only little understanding thereto," J.A. 26, could have reached no other. Such detrimental reliance on implicit assurances of timeliness is precisely the sort of unique circumstances recognized in *Harris Truck Lines* and, under *Harris*, the one day delay in filing petitioner's notice of appeal did not deprive the court of appeals of jurisdiction.

D. Houston's Notice Of Appeal Should Be Treated As A Motion For Extension Of Time Under Rule 4(a)(5).

Rule 4(a)(5) sets forth the procedure by which a litigant may receive an extension of time within which to file the

notice of appeal. The rule provides that a motion may be filed within thirty days of the prescribed time period requesting an extension of time for filing a notice of appeal. "[U]pon a showing of excusable neglect or good cause" the court may grant a thirty day extension or up to a ten day extension from the entry of the order granting extension. Fed. R. App. P.4(a)(5).

Prior to 1979 the counterpart to Rule 4(a)(5) had provided as follows:

> Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Fed. R. App. 4(a), 28 U.S.C. app. (1976). Under this predecessor to present Rule 4(a)(5), an untimely filed notice of appeal filed within sufficient time to allow the district court to extend the time to file the notice entitled the litigant to justify his delay in accordance with the rule. *United States* v. *Lucas*, 597 F.2d 243 (10th Cir. 1979); *Moorer* v. *Griffin*, 575 F.2d 87 (6th Cir. 1978); *United States* v. *Shillingford*, 568 F.2d 1106 (5th Cir. 1978); *Craig* v. *Garrison*, 549 F.2d 306 (4th Cir. 1977); *Reed* v. *Michigan*, 398 F.2d 800 (6th Cir. 1968). The accepted construction was clear that any document filed within the total appeal time (generally thirty days from the entry of the order plus thirty days) which could be construed as either the notice of appeal or a motion for extension entitled the pro se litigant to justify his delay and entitled the district court to excuse it.

This portion of the rule was amended in 1979 for limited purposes. First, the literal reading of the rule had produced some confusion and even some criticism, most notably by Judge Friendly of the United States Court of Appeals for the Second Circuit. *In re Orbitec Corp.*, 520 F.2d 358 (2d Cir. 1975). The literal language of the rule seemed to suggest that the request for extension of time *and* the order granting an extension would both have to occur within thirty days after the expiration of the original appeal period. This construction had been strengthened by the early committee comments to the rule's predecessors and case law. J. Moore, B. Ward, & J. Lucas, 9 Moore's Federal Practice ¶ 204.13[2] (2d ed. 1987). Thereafter, following a 1966 decision by the Fourth Circuit, the general rule of preserving the appeal if the notice of appeal was filed within the total appeal time developed and became generally applied. *Evans* v. *Jones*, 366 F.2d 722 (4th Cir. 1966); *see* J. Moore, B. Ward, & J. Lucas, 9 Moore's Federal Practice ¶ 204.13[2] n.10 (2d ed. 1987).

Still some confusion remained as to the timing of the order granting an extension of time. Judge Friendly explored the controversy in *In re Orbitec Corp.*, 520 F.2d 358 (2d Cir. 1975). Therein the Second Circuit held that a notice of appeal had to be filed no later than sixty days after the judgment from which an appeal is sought. The court also refused to treat a motion for extension filed within the sixty days as a notice of appeal when the prospective appellant was represented by an attorney at the time. In order to clarify this uncertainty the rule was amended in 1979 to allow the notice to be filed within ten days of the order granting an extension of time.

In additional to correcting this situation, the 1979 amendment specified that any request for extension must be made by motion, though at particular times the motion

may be *ex parte*. Finally, the amendment added an additional ground for which an extension might be sought - "good cause" Fed. R. App. P.4 (a)(5).

Following the amendment to the rule, many courts began to apply a different, but neither required nor suggested, interpretation to motions for extensions of time. Courts that had previously held that late-filed notices of appeal could be treated as motions, changed their interpretations and attributed the change to the 1979 amendments without careful analysis. *Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), *cert denied*, 466 U.S. 975 (1984); *Pryor* v. *Marshall*, 711 F.2d 63 (6th Cir. 1983); *Mayfield* v. *United States Parole Comm'n*, 647 F.2d 1053 (10th Cir. 1981); *Sanchez* v. *Board of Regents*, 625 F.2d 521 (5th Cir. 1980).

The Fourth Circuit more carefully scrutinized the judicial rule change in *Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984). A panel of the Fourth Circuit had upheld the circuit's earlier decisions in allowing a late-filed notice of appeal to serve as a motion for extension of time. *Shah* v. *Hutto*, 704 F.2d 717 (4th Cir. 1983). On rehearing en banc, the panel decision was overturned and the Fourth Circuit declared that notices of appeal without manifest requests for additional time would not be construed as motions. *Id.* at 1168-69. In so holding, the court dismissed an appeal of a *pro se* civil rights action even though the notice was either misdelivered or lost in the post office and notwithstanding the fact that the litigants were pro se and incarcerated.

The dissent recognized as has the commentators in the area, that the rule change was not intended to affect the motion for extension but only to address and correct the *In re Orbitec Corp.*, 520 F.2d 358 (2d. Cir. 1975) problem.

Shah v. *Hutto*, 722 F.2d 1167, 1169 (4th Cir.), (Haynsworth, J., dissenting), *cert. denied*, 466 U.S. 975 (1984). J. Moore, B. Ward & J. Lucas, 9 Moore's Federal Practice ¶ 204.02[1] (2d. ed. 1987). In dissent, Judges Haynsworth, Winter, Murnaghan, and Ervin noted that the 1979 amendments effected three substantive changes in Rule 4(a)(5), none of which is relevant to the problem presented in this case." *Id.* at 1169. The dissent went on to discuss the *Orbitec* revision which "solved a vexing problem created by a rigid interpretation of an earlier version of the rule. Nothing in those changes, however, appears . . . to be a rejection of the kind of flexible application of the rule represented by *Craig* v. *Garrison*, and kindred cases in both the Supreme Court and the Courts of Appeals." *Id.*

Some courts have continued to give validity to the pre-1979 amendment interpretation, following the rationale of the dissent in *Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), at least to the extent that a remand for a good cause or excusable neglect determination is required. In *Fearon* v. *Henderson*, 756 F.2d 267 (2d Cir. 1985) a district court remand was ordered by the United States Court of Appeals for the Second Circuit in a section 1983 action in which the notice of appeal was filed fifty-six days after judgment was entered. The court remanded and ordered the district court to "determine whether to treat the notice of appeal as an application for extension of time pursuant to rule 4(a)(5) and whether, in the interests of justice, the late appeal should be allowed." *Id.* at 267-68 (citing *Stirling* v. *Chemical Bank*, 511 F.2d 1030 (2d Cir. 1975)).

In the case at bar the United States Court of Appeals for the Sixth Circuit never gave Houston that opportunity. While they did allow him to show cause why his appeal should not be dismissed, J.A. 26, they never

addressed the issues raised in his filing, J.A. 25-26, nor remanded to permit the district court to do so.

Some courts, while not allowing the late-filed notice of appeal to serve as the motion, have provided a procedure to assist the litigant who files a notice of appeal which he relies on as timely. In *United States* v. *Lucas*, 597 F.2d 243 (10th Cir. 1979), the United States Court of Appeals for the Tenth Circuit saw the inequities which existed for *pro se* litigants and grappled with the problem that occurs when the *pro se* appellant is not notified of his technical noncompliance until it is too late to remedy the problem by filing a motion for extension: "It would be most helpful if the district court would advise a would-be appellant, and particularly one who is pro se, that his notice of appeal is untimely, thereby putting him on notice that some immediate action is yet required to secure appellate jurisdiction." *Id.* at 245. The Eighth Circuit in *Campbell* v *White*, 721 F.2d 644 (8th Cir. 1983), fortified the procedure by declaring it mandatory that district court clerks review notices of appeal for timeliness and advise *pro se* litigants when it is necessary for them to file a motion for extension of time. Additionally, the court required the preparation of a notice for litigants which explained the time requirements of Rules 3 and 4. *Id.* at 647. Although the Sixth Circuit endorsed these protections in the *pro se* context in *Pryor* v. *Marshall*, 711 F.2d 63, 65 n.4 (6th Cir. 1983) (quoting *United States* v. *Lucas*, 597 F.2d 243, 245 (10th Cir. 1979)), it provided no such protection for Houston. J.A. 31. Thus Houston learned of the untimeliness of his petition after it was too late to do anything to rectify the situation, J.A. 23, and his appeal from the denial of his petition for habeas corpus has been barred permanently.

This Court has described the writ of habeas corpus as

> the fundamental instrument for safeguarding individual freedom against arbitary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution that: "The Privilege of the Writ of Habeas Corpus shall not be suspended . . . ." U.S. Const., Art I, § 9, cl. 2. The scope and flexibility of the writ - its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes - have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Harris v. *Nelson*, 394 U.S. 286, 290-91 (1969). Although it is a civil proceeding, *Ex Parte Tom Tong*, 108 U.S. 826 (1883), this "label is gross and inexact." *Harris* v. *Nelson*, 394 U.S. 286, 293-94 (1969). In recognition of the unique nature of the proceeding, *id.* at 294, Rule 81(a)(2) of the Federal Rules of Civil Procedure and Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts limit the applicability of the Federal Rules of Civil Procedure. In the context of a *pro se* petition for habeas corpus the requirement of a formal motion for extension, such as would satisfy rule 7(b) of the Federal Rules of Civil Procedure, is inconsistent with the leniency which this Court has shown *pro se* litigants in general, *see Haines* v. *Kerner*, 404 U.S. 519 (1972), and habeas corpus petitioners in particular. *See Holiday* v. *Johnston*, 313 U.S. 342, 350 (1941). In habeas corpus cases, above all others, "the proponent before the Court is not the petitioner but the Constitution of the United States." *Chessman* v. *Teets*, 354 U.S. 156, 165 (1957). For that reason, if for no other, Houston's *pro se* notice of appeal filed on the thirty-first day should be treated as timely or, alternatively, as a motion for an extension and the case

returned to the district court for a determination of the issue of excusable neglect under Rule 4(a)(5).

CONCLUSION

For the reasons set forth above, Petitioner Prentiss Houston respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit be reversed and this case remanded for consideration on the merits or, in the alternative, that the case be remanded with instruction for further remand to the United States District Court for the Western District of Tennessee, Eastern Division for a full inquiry into the jurisdictional facts.

Respectfully submitted,

PENNY J. WHITE
(Appointed by this Court)
207 East Unaka Avenue
Johnson City, TN 37601
(615) 928-6005

Counsel for Petitioner

No. 87-5425

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In The
Supreme Court of the United States
October Term, 1987

PRENTISS HOUSTON,

Petitioner,

v.

LARRY LACK,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE RESPONDENT

W. J. Michael Cody
Attorney General of Tennessee

Jerry L. Smith
Deputy Attorney General
Counsel of Record

Gordon W. Smith
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6439

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals lacked jurisdiction of a *pro se* petitioner's appeal from the district court's denial of a writ of habeas corpus when the petitioner delivered his notice of appeal to prison authorities for mailing three days prior to the due date but the notice was received and filed by the clerk one day late.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT:	
I. THE PETITIONER'S UNTIMELY NOTICE OF APPEAL DEPRIVED THE COURT OF APPEALS OF JURISDICTION.	6
II. THE PETITIONER'S RELIANCE UPON THIS COURT'S PRIOR DECISIONS IN *FALLEN v. UNITED STATES* AND *HARRIS TRUCK LINES, INC. v. CHERRY MEAT PACKERS, INC.*, IS MISPLACED.	11
A. The Rule In *Fallen* Is Inapplicable To Civil Appeals.	11
B. *Fallen* Is Factually Distinguishable From This Case.	14
C. The "Unique Circumstances" Doctrine Established By *Harris* And Its Progeny Is Plainly Inconsistent With Subsequent Decisions Of This Court.	16
III. THE PETITIONER COULD HAVE SOUGHT RELIEF IN THE DISTRICT COURT UNDER RULE 60, FED. R. CIV. P.	21
CONCLUSION	25

TABLE OF AUTHORITIES

	Page
CASES:	
Barefoot v. Estelle, 463 U.S. 880 (1983)	21
Brooks v. Britton, 669 F.2d 665 (11th Cir. 1982)	10
Browder v. Director, Department of Correction of Illinois, 434 U.S. 257 (1978)	6, 7, 19, 24
Campbell v. White, 721 F.2d 644 (8th Cir. 1983)	10
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	13
Darr v. Burford, 339 U.S. 200 (1950)	22
Department of Banking, State of Nebraska v. Pink, 317 U.S. 264 (1942)	13
Fallen v. United States, 378 U.S. 139 (1964)	3, 5, 11, 12, 14, 16
Felshina v. Schweiker, 707 F.2d 71 (2d Cir. 1983)	24
Griggs v. Provident Consumer Discount Company, 459 U.S. 56 (1982)	6, 7, 8, 19
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962)	5, 11, 16, 18, 20, 21
Herman v. Guardian Life Insurance Company of America, 762 F.2d 288 (3d Cir. 1985)	10
James v. United States, 459 U.S. 1044 (1982)	24
Klapprott v. United States, 335 U.S. 601 (1949)	23
Martella v. Marine Cooks & Stewards Union, Seafarers International Union of North America, AFL-CIO, 448 F.2d 729 (9th Cir. 1971)	24
Matton Steamboat Co. v. Murphy, 319 U.S. 412 (1943)	7
Mayfield v. United States Parole Commission, 647 F.2d 1053 (10th Cir. 1981)	10

TABLE OF AUTHORITIES—Continued

	Page
Myers v. Stephenson, 748 F.2d 202 (4th Cir. 1984)	10
Parissi v. Telechron, Inc., 349 U.S. 46 (1955)	7
Pettibone v. Cupp, 666 F.2d 333 (9th Cir. 1981)	10
Price v. Johnston, 334 U.S. 266 (1948)	22
Pryor v. Marshall, 711 F.2d 63 (6th Cir. 1983)	10
Rodgers v. Watt, 722 F.2d 456 (9th Cir. 1983)	23
Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980)	10
Schacht v. United States, 398 U.S. 58 (1970)	13
Shah v. Hutto, 722 F.2d 1167 (4th Cir. 1983)	10
Thomson v. Immigration and Naturalization Service, 375 U.S. 384 (1964)	16, 17, 18, 20, 21
United States v. Locke, 471 U.S. 84 (1985)	6, 18
United States v. Lombardo, 241 U.S. 73 (1916)	7
United States v. O'Leary, 788 F.2d 1238 (7th Cir. 1986)	10
United States v. O'Neil, 709 F.2d 361 (5th Cir. 1983)	23
United States v. Robinson, 361 U.S. 220 (1960)	7
United States v. Sherwood, 312 U.S. 584 (1941)	13
Wolfsohn v. Hankin, 321 F.2d 393 (1963)	17, 20, 21
Wolfsohn v. Hankin, 376 U.S. 203 (1964)	17
Wyzik v. Employee Benefit Plan of Crane Company, 663 F.2d 348 (1st Cir. 1981)	10

TABLE OF AUTHORITIES—Continued

	Page
CONSTITUTION AND STATUTES:	
18 U.S.C. § 3771	13
18 U.S.C. § 3772	12, 13
28 U.S.C. § 2072	13
28 U.S.C. § 2075	13
28 U.S.C. § 2107	4, 5, 7, 12, 14
Rule 1(b), Fed. R. App. P.	13
Rule 3(a), Fed. R. App. P.	7
Rule 4, Fed. R. App. P.	21, 22
Rule 4(a), Fed. R. App. P.	7, 8, 10, 14, 16, 24
Rule 4(a)(1), Fed. R. App. P.	7, 8
Rule 4(a)(5), Fed. R. App. P.	4, 8, 9, 10, 19, 21, 23, 24
Rule 26(b), Fed. R. App. P.	4, 8, 19
Rule 52, Fed. R. Civ. P.	17, 20
Rule 59, Fed. R. Civ. P.	17, 19, 20
Rule 60, Fed. R. Civ. P.	6, 22, 25
Rule 60(b), Fed. R. Civ. P.	23, 24
Rule 60(b)(6), Fed. R. Civ. P.	24
Rule 73(a), Fed. R. Civ. P.	16, 17, 20, 21
OTHER AUTHORITIES:	
11 C. Wright & A. Miller, Federal Practice and Procedure § 2851 (1973 ed.)	22
16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3947 (1977 ed.)	13

No. 87-5428

In The
Supreme Court of the United States
October Term, 1987

PRENTISS HOUSTON,

Petitioner,

v.

LARRY LACK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

On November 15, 1982, after entering a plea of guilty, the petitioner was convicted in the Circuit Court of Obion County, Tennessee, of murder in the second degree and was sentenced to a term of fifty (50) years in the state penitentiary. He subsequently filed a petition for post-conviction relief in the trial court, alleging involuntariness of his plea and ineffective assistance of counsel. Fol-

lowing an evidentiary hearing at which the petitioner was represented by counsel, the trial court denied post-conviction relief. The Court of Criminal Appeals of Tennessee affirmed the judgment and the Supreme Court of Tennessee denied review.

On May 15, 1985, the petitioner filed in the district court a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging involuntariness of his guilty plea and ineffective assistance of counsel. (Dist. Ct. Ex. 2). On January 6, 1986, the district court entered an order dismissing the petition. (J.A. 2). On January 7, 1986, a judgment on the decision of the court was entered. (J.A. 19).

On February 7, 1986, thirty-one (31) days after the date of entry of the judgment, the petitioner's notice of appeal was filed with the district court clerk. (J.A. 21). No extension of time for filing the notice of appeal was requested from or granted by the district court. On February 18, 1986, the district court granted a certificate of probable cause. (J.A. 22).

The district court record was transmitted to the court of appeals, the appeal was docketed, and a briefing schedule was established. On March 21, 1986, the court of appeals, noticing the untimely filing of the notice of appeal, entered an order requiring the petitioner to show cause in writing not later than twenty-one (21) days therefrom why the appeal should not be dismissed for lack of jurisdiction. (J.A. 23). The court further ordered the briefing schedule to be held in abeyance pending resolution of the jurisdictional question. (J.A. 23).

On April 3, 1986, the petitioner filed a response to the court's show-cause order stating that until January 13, 1986, he was confined at an institution where a severe riot had occurred in 1985, that the institution's legal materials were destroyed during the riot, and that there was a "lock-down" of all inmates, which continued "up and until the month of January and afterwards". The petitioner alleged that at the time he received the district court's order of dismissal he was having to work six days a week and the legal material had not yet been adequately restored. The petitioner stated that on January 13, 1986, he was transferred to another institution, where he was required to undergo "orientation" for the first week, following which he "began his appeal". He alleged that on February 3, 1986, he "forwarded" his appeal, believing that the date of mailing would be the filing date. He further alleged that he requested the institution to certify that his appeal had been mailed before the expiration date and requested that it be sent airmail, but institutional policy required him to pay these additional costs and he was without sufficient funds to do so.[1] (J.A. 26). In a separate pleading, the petitioner asked the court of appeals to accept his appeal, citing *Fallen v. United States*, 378 U.S. 139 (1964). (J.A. 25).

On August 23, 1986, the court of appeals entered an order appointing counsel on the appeal and requesting

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[1]To demonstrate that he mailed his notice of appeal on February 3, 1986, the petitioner attached to his response a copy of a log sheet of outgoing legal mail for that date, bearing a notation, "Prentiss Houston United States Dist. Court of appeal Box 909 Jackson, TN 38302". (J.A. 28). The correct address for the district court clerk is P. O. Box 756, Jackson, Tennessee 38301.

appointed counsel to brief the jurisdictional issue as one of the issues on appeal. (J.A. 29). Following the filing of briefs by both the petitioner and the respondent, the court of appeals scheduled oral argument. At the close of argument, the court dismissed the appeal in open court. On May 22, 1987, the court entered a written order dismissing the case "for want of jurisdiction". (J.A. 31). On July 10, 1987, the petitioner's request for a rehearing *en banc* was denied. (J.A. 32).

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SUMMARY OF ARGUMENT

The timely filing of a notice of appeal under Rule 4, Fed. R. App. P., is "mandatory and jurisdictional". The instant civil appeal was subject to the time requirements of Rule 4(a) and 28 U.S.C. § 2107, which provide that the notice must be filed within thirty days of the date of the entry of judgment. Under Rule 4(a)(5) the district court may grant an extension for "excusable neglect or good cause" upon motion filed not later than thirty days after the expiration of the original thirty-day period. The notice must be received by the clerk before the time has expired.

In the instant case, the petitioner's notice of appeal was filed one day late. No motion for extension of time was filed by the petitioner and the thirty-day grace period had expired by the time the case was docketed in the court of appeals. Rule 26(b), Fed. R. App. P., prohibits a court of appeals from enlarging the time for filing a notice of appeal, and present Rule 4(a)(5), specifically providing

that a motion must be filed with the district court to obtain an extension, precludes a construction of the late-filed notice as a motion requesting an extension of time. The petitioner's failure to file a timely notice of appeal, followed by a failure to make a timely motion for an extension, extinguished his appeal and deprived the court of appeals of jurisdiction to entertain it.

The petitioner's reliance upon this Court's prior decisions in *Fallen v. United States*, 378 U.S. 139 (1964), and *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and its progeny, is misplaced. First, *Fallen*, a criminal case in which this Court excused the timely filing of a notice of appeal where appellant did "all he could under the circumstances" to perfect his appeal, is inapplicable to civil appeals. In civil cases, Congress has specifically provided by statute a time limit for civil appeals. 28 U.S.C. § 2107. Congressionally mandated jurisdictional limits cannot be waived by the courts.

Second, *Fallen* is factually distinguishable from the instant case. The petitioner in this case, who was neither ill nor handicapped, had thirty days to file the one-sentence notice of appeal, yet he waited until the twenty-seventh day to mail his notice. Moreover, the petitioner mailed the notice to an incorrect address. It cannot be said that the petitioner in this case did "all he could" to perfect his appeal.

Third, the "unique circumstances" doctrine, permitting an appellant to maintain an otherwise untimely appeal in "unique" circumstances in which the appellant reasonably relied upon judicial action indicating that the appeal would be timely, is plainly inconsistent with this Court's

decisions in *United States v. Locke*, 471 U.S. 84 (1985), *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982), and *Browder v. Director, Department of Correction of Illinois*, 434 U.S. 257 (1978).

Fourth, *Harris* and its progeny are distinguishable from the instant case. These cases do not support the petitioner's contention that an otherwise untimely notice of appeal may be excused in the presence of "unique circumstances." Furthermore, in the instant case, there was no explicit action by the district court upon which the petitioner could place reasonable reliance that his appeal was timely.

Rule 60, Fed. R. Civ. P., prescribes the procedure by which a party may obtain relief from a final judgment. Rather than seeking relief pursuant to Rule 60, the petitioner has asked the court of appeals and this Court to adopt an equitable exception to Rule 4 for *pro se* prisoners, a course which, if followed, would emasculate the requirements of Rule 4 and extend the jurisdiction of the courts of appeals beyond statutory limits.

ARGUMENT

I. THE PETITIONER'S UNTIMELY NOTICE OF APPEAL DEPRIVED THE COURT OF APPEALS OF JURISDICTION.

For an appeal from a decision of a district court, the Federal Rules of Appellate Procedure require the filing of a "notice of appeal with the clerk of the district court

within the time allowed by Rule 4." Rule 3(a), Fed. R. App. P. Receipt by the clerk constitutes "filing". *See Parissi v. Telechron, Inc.*, 349 U.S. 46, 47 (1955) (per curiam). The Court has recognized that "[a]nything short of delivery" would leave the filing a disputable fact. *United States v. Lombardo*, 241 U.S. 73, 77 (1916).

This Court has repeatedly held that the timely filing of a notice of appeal is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the Court of Appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *Browder v. Director, Department of Correction of Illinois*, 434 U.S. 257, 264 (1978); *United States v. Robinson*, 361 U.S. 220, 224 (1960).

The clear purpose of the rule is "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made, and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose." *Browder, supra*, at 264, quoting *Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943).

A habeas corpus action is considered a "civil" matter and thus subject to the time requirements set forth in Rule 4(a), Fed. R. App. P. *Browder, supra*, at 264 n. 9. In a civil appeal not involving the United States government, the notice of appeal must be filed within thirty (30) days of the date of entry of the judgment appealed from. Rule 4(a)(1), Fed. R. App. P.; 28 U.S.C. § 2107. Rule

4(a)(5) provides for extensions of time in certain circumstances:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed in this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of the entry of the order granting the motion, whichever occurs later.

In the instant case, the district court's judgment was entered on January 7, 1986. The petitioner's notice of appeal was filed with the district court clerk thirty-one (31) days later, on February 7, 1986, one (1) day late under Rule 4(a)(1). There was no motion for extension of time filed by the petitioner, and the grace period had expired by the time the case was docketed in the court of appeals. Since Rule 26(b), Fed. R. App. P., prohibits a court of appeals from enlarging the time for filing a notice of appeal, *see Griggs, supra,* at 61 n.3 (1982), the court of appeals properly concluded that it was without jurisdiction to entertain the appeal.

The petitioner contends that the court of appeals should have construed his notice of appeal as a motion for an extension of time for filing a notice of appeal. Prior to the 1979 amendment to Rule 4(a)(5), the pertinent portion of Rule 4(a) stated that:

> Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Before the rule's amendment, the requirement of a motion for an extension was less explicit.

One of the primary purposes of the 1979 amendment was to remove the possibility of an informal application for an extension of time. Rule 4(a)(5), as amended, however, specifically conditions an extension of time for filing a notice of appeal upon the filing of a motion within thirty days after the expiration of the initial thirty-day filing period. The notes of the Advisory Committee on Appellate Rules state:

> The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date. . . .
>
> Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made *ex parte*. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. and local rules of the district court.

The requirement in Rule 4(a)(5) that an extension for filing a notice of appeal in civil cases be obtained only by motion is contrasted with, and reinforced by, the provision in Rule 4(b) for filing a notice in criminal cases, permitting the district court to extend the time for filing, before or after the time has expired, "with or without motion and notice" upon a showing of excusable neglect. Every federal circuit which has considered the issue has agreed that the present Rule 4(a) prohibits the construction of a late-filed notice of appeal as a motion requesting an extension of time. *See United States v. O'Leary*, 788 F.2d 1238 (7th Cir. 1986); *Herman v. Guardian Life Insurance Company of America*, 762 F.2d 288 (3rd Cir. 1985); *Myers v. Stephenson*, 748 F.2d 202 (4th Cir. 1984); *Shah v. Hutto*, 722 F.2d 1167 (4th Cir. 1983) (*en banc*), *cert. denied*, 466 U.S. 975 (1984); *Campbell v. White*, 721 F.2d 644 (8th Cir. 1983); *Pryor v. Marshall*, 711 F.2d 63 (6th Cir. 1983); *Brooks v. Britton*, 669 F.2d 665 (11th Cir. 1982); *Pettibone v. Cupp*, 666 F.2d 333 (9th Cir. 1981); *Wyzik v. Employee Benefit Plan of Crane Company*, 663 F.2d 348 (1st Cir. 1981); *Mayfield v. United States Parole Commission*, 647 F.2d 1053 (10th Cir. 1981); *Sanchez v. Board of Regents of Texas Southern University*, 625 F.2d 521 (5th Cir. 1980).

In view of the plain wording of present Rule 4(a)(5), the clear intent of the drafters of the 1979 amendment, and the virtual unanimity among the circuits, this Court should decline to adopt the petitioner's suggestion that courts of appeals be allowed to treat late-filed notices of appeal in civil cases as motions for extension of time. The petitioner's failure to file a timely notice of appeal, followed by

failure to make a timely motion for an extension, extinguished the petitioner's right to appeal.

II. THE PETITIONER'S RELIANCE UPON THIS COURT'S PRIOR DECISIONS IN FALLEN v. UNITED STATES AND HARRIS TRUCK LINES, INC. v. CHERRY MEAT PACKERS, INC. IS MISPLACED.

A. The Rule In Fallen Is Inapplicable To Civil Appeals.

The petitioner concedes the mandatory and jurisdictional nature of a notice of appeal, but contends that under this Court's decision in *Fallen v. United States*, 378 U.S. 139 (1964), technical compliance with the time requirements of Rule 4 may be excused under extraordinary circumstances. In *Fallen*, the appellant was a federal prisoner seeking direct appeal from his federal court criminal conviction. Immediately after sentencing Fallen's attorney told him he would be unable to represent him on appeal and that Fallen should secure another attorney promptly to avoid the loss of an appeal right. However, Fallen was ill and was taken the next day to a hospital, where he was not permitted to have visitors and was unable to secure a new attorney. Several days later, Fallen felt well enough to write and wrote two letters: one asking for a new trial and another requesting that his case be appealed. The letters were promptly mailed and would, in the normal course of events, have been received by the clerk within the ten days provided by the rule for filing the notice of appeal. However, because of either a delay in mail delivery or the mail procedure in the federal prison, Fallen's letters were not received until fourteen days after sentencing. Finding that Fallen "did all he could under

the circumstances," the Court concluded that the delay in filing was not properly chargeable to him and ordered the court of appeals to hear the appeal on the merits. 378 U.S. at 144.

Unlike *Fallen*, the instant case is civil in nature. In civil cases, Congress has specifically provided by statute a time limit for appeals to the courts of appeals. Section 2107 of Title 28, U.S.C., provides, in pertinent part:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> . . .
>
> The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

There is no like statutory provision for criminal appeals.[2]

Although the rule-making process has resulted in a modification of the required showing for an extension of time to a standard of "excusable neglect or good cause", the time limits prescribed by 28 U.S.C. § 2107 for the tak-

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[2]The power to promulgate rules prescribing "the times for and manner of taking appeals [to the courts of appeals] and applying for writs of certiorari" in criminal cases is given to the Supreme Court. 18 U.S.C. § 3772.

ing of an appeal in a civil case have not been changed.[3] Congressionally mandated jurisdictional limits may not be overcome by equitable arguments, even in situations that might call for such a result under a court rule. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 472-475 (1978); *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264 (1942) (holding that a petition for writ of certiorari must be dismissed for want of jurisdiction where the petition was filed beyond the statutory ninety-day period in a civil case).

On the other hand, filing time requirements established by court rule, as distinguished from a requirement promulgated by statute, are not inherently jurisdictional. *Schacht v. United States*, 398 U.S. 58, 63-64 (1970) (holding that the Court's rule establishing a thirty-day time limitation for filing a petition for a writ of certiorari in a federal criminal case is not jurisdictional, noting that "it must be remembered that this rule was not enacted by Congress but was promulgated by this Court under author-

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[3]The Federal Rules of Appellate Procedure are drawn under the authority of 28 U.S.C. § 2072, 28 U.S.C. § 2075, 18 U.S.C. § 3771, and 18 U.S.C. § 3772, which "give to the Supreme Court power to make rules of practice and procedure for all cases within the jurisdiction of the courts of appeals. By the terms of the statutes, after the rules have taken effect all laws in conflict with them are of no further force or effect." Notes of Advisory Committee on Appellate Rules, Rule 1, Fed. R. App. P. At the same time, these statutes do not give the Court any authority to modify, abridge, or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of courts of appeals. *United States v. Sherwood*, 312 U.S. 584, 589-590 (1941) (construing an earlier statute giving the Court power to prescribe rules of procedure in civil actions in federal district courts); Rule 1(b), Fed. R. App. P.; 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3947 (1977 ed.).

ity of Congress to prescribe rules concerning the time limitations of taking appeals and applying for certiorari in criminal cases."). *See also* 398 U.S. at 68 (Harlan, J., concurring) ("Because we cannot 'waive' congressional enactments, the statutory time limits are treated as jurisdictional."). The time limits for filing a notice of appeal in civil cases, prescribed by 28 U.S.C. § 2107 and applied through Rule 4(a), Fed. R. App. P., are jurisdictional and not waivable. Therefore, the holding in *Fallen* that the timely filing of a notice of appeal may be excused where the petitioner had done "all he could under the circumstances", is inapplicable to the instant civil case.

B. Fallen Is Factually Distinguishable From This Case.

Even assuming that *Fallen* is applicable to civil cases, the instant case is factually distinguishable. In *Fallen*, the petitioner, a paraplegic who was suffering from the flu, had only ten days from sentencing to appeal. Immediately after the sentencing hearing his attorney informed him that he would not represent him on appeal and that he should secure another attorney promptly. After this brief conference, the petitioner was taken to a medical center and the next day was transferred to hospital facilities in Atlanta to begin his sentence. At neither institution was he permitted visitors. On the eighth day after sentencing, the petitioner felt well enough to write and promptly mailed that same day two letters to the district court in Jacksonville asking for a new trial and an appeal. In the normal course of events, the letters would have been received by the clerk within the ten days, but in fact they were not received by the clerk until the fourteenth day

after sentencing because of a delay in the mail pickup at the prison.

In this case, the petitioner had thirty days within which to appeal, but did not mail the notice of appeal until the twenty-seventh day. The petitioner was neither ill nor handicapped. In response to the court of appeals' show-cause order, the petitioner acknowledged receipt of the district court's January 6, 1986, order while he was incarcerated. (J.A. 26). Although he alleged that as a result of a prison riot several months earlier he did not have adequate access to legal materials at that institution, he admitted that he was transferred to another state prison, Lake County Regional Correctional Facility, on January 13, 1986, (J.A. 26-27), which was twenty-four days prior to the filing deadline. The petitioner made no claim as to the adequacy of access to legal materials at that institution. He alleged that during the first week at the new prison he was required to undergo orientation procedures, but alleged no other obstacles to the perfection of his appeal. (J.A. 27). The petitioner stated no reason for waiting until February 3, 1986, three days before the filing deadline, to deposit the one-sentence notice of appeal for mailing with prison authorities.

Despite the petitioner's dilatoriness, it is reasonable to assume that the notice of appeal would have reached the clerk's office in Jackson for timely filing by February 6 had the petitioner not posted the notice to an incorrect address. As indicated by the prison mail log, the petitioner's February 3 correspondence to the district court in Jackson, Tennessee, was addressed to "Box 909" (J.A. 28), the mailing address for the Clerk of the Supreme

Court of Tennessee at Jackson, rather than Box 756, the correct address for the district court clerk in Jackson.

The petitioner in this case clearly did not do "all he could under the circumstances" to get his notice of appeal to its destination within the required thirty days. Should this Court conclude that the principle of *Fallen* is applicable to civil cases, the respondent submits that the instant case is factually distinguishable.

C. The "Unique Circumstances" Doctrine Established By Harris And Its Progeny Is Plainly Inconsistent With Subsequent Decisions Of This Court.

The petitioner also contends that three *per curiam* decisions of this Court, *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384 (1964), and *Wolfsohn v. Hankin*, 376 U.S. 203 (1964), establish a "unique circumstances" doctrine permitting the late notice of appeal in the instant case.

In *Harris* the appellant moved during the initial filing period for an extension of time to file his notice of appeal. Under Rule 73(a), Fed. R. Civ. P., the predecessor to former Rule 4(a), Fed. R. App. P., a thirty-day extension of the initial filing period was permitted if an extension was justified by "excusable neglect based on a failure of a party to learn of the entry of the judgment." 371 U.S. at 217. The district court found excusable neglect and granted a two-week extension from the end of the initial filing period. The court of appeals reversed the finding of excusable neglect and concluded that, because of the absence of excusable neglect, the notice of appeal was untimely filed and the appeal was required to be dismissed. 371 U.S. at 216. This Court reversed, stating:

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling.

371 U.S. at 217.

In *Thompson*, the district court entered a final order denying relief. The appellant then filed untimely post-trial motions under Rule 52, Fed. R. Civ. P., to amend certain findings of fact and under Rule 59, Fed. R. Civ. P., for a new trial. 375 U.S. at 385. The government raised no objection to the timeliness of the motions and the district court specifically declared them to be timely. *Id.* Within the sixty-day time limit under Rule 73(a) from the date of the district court's denial of the motions (but not from the date of the original order) the appellant filed a notice of appeal. Although the motions were untimely, this Court, with four justices dissenting, reversed the court of appeals' dismissal, holding that Rule 73(a) was satisfied because of the "unique circumstances" of the appellant's reliance on the district court's error. *Id.* at 387.

The *Wolfsohn* case presented the same fact situation as *Thompson*, *see Wolfsohn v. Hankin*, 321 F.2d 393 (1963), and the Court, in a one-sentence order, with four justices

dissenting, reversed the judgment under the authority of *Harris* and *Thompson*. 376 U.S. at 203.

Following the decisions in these three cases, the Court has remained silent on the "unique circumstances" doctrine for more than twenty years. In the interim, the Court has decided at least three cases which have drained the "unique circumstances" doctrine of vitality, if not overruled it by implication. In *United States v. Locke*, 471 U.S. 84 (1985), a claimant's mining claims were extinguished under the Federal Land Policy and Management Act for failing to meet the annual filing deadline by one day. Against the claimant's contentions that the statute was ambiguous, that he had relied on a misleading official construction, and that he had not adequately researched the question, this Court noted:

> The notion that a filing deadline can be complied with by filing sometime after the deadline falls due is, to say the least, a surprising notion, and it is a notion without limiting principle. If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. "Any less rigid standard would risk encouraging a lax attituude toward filing dates," *United States v. Boyle*, 469 U.S., at —, 105 S.Ct., at 692. A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.

471 U.S. at 100-101.

In *Griggs v. Provident Consumer Discount Company*, 459 U.S. 56 (1982), the Court held that a notice of appeal filed in advance of a Rule 59 motion becomes a nullity when the Rule 59 motion is filed, and that an appellant must re-file a new and timely notice of appeal or forfeit review. 459 U.S. at 61. The decision enforced the literal language of Rule 4(a)(4), Fed. R. App. P., over the contention that the defects in a premature notice of appeal could be waived under Rule 2, Fed. R. App. P. The Court stated that

> Rule 2 does not purport to vest unlimited discretion in the court of appeals. That Rule explicitly states that the discretion it authorizes is limited by Rule 26(b), which prohibits courts of appeals from enlarging the time for filing a notice of appeal.

459 U.S. at 61 n 3.

In *Browder v. Director, Department of Correction of Illinois*, 434 U.S. 257 (1978), twenty-eight days after judgment a party filed in the district court a motion for a stay and for an evidentiary hearing. The district court granted the motion, conducted an evidentiary hearing, and later entered a new judgment. This Court held the appeal untimely. Although the district court had granted the motion at a time when there was still time left for an appeal of the original judgment, the motion, ineffective under Rule 59, was held not to have tolled the appeal period. This Court repeatedly emphasized the litigants' interest in finality. 434 U.S. at 264, 271.

The "unique circumstances" doctrine, permitting an appellant to maintain a notherwise untimely appeal in unique circumstances in which the appellant reasonably relied upon judicial action indicating that his appeal would

be timely, is plainly inconsistent with these recent decisions. This Court should expressly reject the doctrine and adopt the reasoning of the dissent in *Thompson*:

> Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of the courts to enforce them according to their terms. Changes in rules whose inflexibility has turned out to work hardship should be effected by the process of amendment, not by *ad hoc* relaxations by this Court in particular cases. Such dispensations in the long run actually produce mischievous results, undermining the certainty of the rules and causing confusion among the lower courts and the bar.

375 U.S. at 390 (Clark, J., dissenting).

D. Harris, Thompson, And Wolfsohn Are Distinguishable From This Case.

Assuming arguendo that *Harris*, *Thompson*, and *Wolfsohn* remain valid precedent, the principles announced therein are inapplicable to this case. *Harris*, *Thompson*, and *Wolfsohn* do not support the petitioner's contention that an otherwise untimely notice of appeal may be excused in the presence of "unique circumstances". Indeed, the *Harris* case does not address the issue of whether a district court can extend the filing period beyond the allowable time provided by the rule. The extension granted by the district court was well within the thirty days allowed by Rule 73(a).

Likewise, *Thompson* does not support the petitioner's position in this case. Since timely motions under Rules 52 and 59 would have tolled the running of the initial time period of Rule 73(a), the question in *Thompson* was whether the Rule 73(a) time period was triggered, not whether that time period could be extended beyond its limits. The *Wolfsohn* case, presenting the same facts as *Thompson*, is also distinguishable for the same reasons.

Moreover, the instant case is factually distinguishable from those cases. The petitioner essentially claims that "unique circumstances" are present because the appeal was routinely processed and was not dismissed until after his time period for an extension had lapsed. However, the key element of the "unique circumstances" doctrine is that the party must reasonably rely on judicial action taken prior to the expiration of the time period for appeal. In this case, the petitioner did not request, nor did the district court or the court of appeals purport to grant, an extension of time for the filing of the notice of appeal. The granting of a certificate of probable cause by the district court, being merely the primary means of separating meritorious from frivolous appeals, *Barefoot v. Estelle*, 463 U.S. 880, 892-893 (1983), is not a basis for reasonable reliance that an appeal is timely. There being no explicit judicial action upon which the petitioner could have reasonably relied, the "unique circumstances" found in *Harris*, *Thompson*, and *Wolfsohn* are not present.

III. THE PETITIONER COULD HAVE SOUGHT RELIEF IN THE DISTRICT COURT UNDER RULE 60, FED. R. CIV. P.

Although Rule 4(a)(5) already provides for a remedy for late-filed notices of appeal, the petitioner suggests that the Court should adopt an additional equitable exception to Rule 4 for *pro se* prisoners, noting the Court's leniency

in applying the rules of practice and pleading to *pro se* prisoners in such cases as *Darr v. Burford,* 339 U.S. 200 (1950), *Price v. Johnston,* 334 U.S. 266 (1948), and *Holiday v. Johnston,* 313 U.S. 342 (1941). It is significant that none of these cases involved the waiver of a mandatory and jurisdictional filing requirement. The course suggested by the petitioner would emasculate the requirements of Rule 4 and extend the jurisdiction of the courts of appeals beyond statutory limits.

The petitioner also suggests that the clerks' offices should screen notices of appeals and, in the event of untimely filing, notify *pro se* litigants of the necessity of filing a motion for extension. The present rules do not require the clerks to perform that function and such a change in the rules is better left to the rules amendment process and congressional approval.

Rule 60, Fed. R. Civ. P., prescribes the procedures by which a party may obtain relief from a final judgment. "The rule attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2851 (1973 ed.). Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the

> judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer requitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Except in truly extraordinary cases, Rule 60(b) relief should not be used to extend the time for appeal, for it squarely collides with Rule 4(a)(5), Fed. R. App. P., which embodies the significant principle of protecting the finality of judgments. *United States v. O'Neil,* 709 F.2d 361, 373 (5th Cir. 1983). However, this Court recognized in *Klapprott v. United States,* 335 U.S. 601 (1949), that Rule 60(b)(6) "vests powers in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." 335 U.S. at 615.

Relief under Rule 60(b) has been recognized as appropriate to remedy an excusable failure to take a timely appeal. *Rodgers v. Watt,* 722 F.2d 456, 459 (9th Cir. 1983)

(*en banc*) (emphasizing that Rule 60(b) relief is available only if the excusable neglect arises after the sixty-day period provided by Rule 4(a)). *Felshina v. Schweiker*, 707 F.2d 71, 71 (2d Cir. 1983); *Martella v. Marine Cooks & Stewards Union, Seafarers International Union of North America, AFL-CIO*, 448 F.2d 729, 730 (9th Cir. 1971) (denying relief, but recognizing the availability of Rule 60(b)(6) relief to a petitioner who can establish "the existence of extraordinary circumstances which prevented or rendered him unable to prosecute an appeal"). In *Browder, supra*, this Court recognized that despite the finality of the original judgment, the district court had the authority to grant relief from the judgment under Rule 60(b). 434 U.S. at 263 nn. 7 & 8, and 434 U.S. at 272-274 (Blackmun. J., concurring). *See also James v. United States*, 459 U.S. 1044, 1046-1047 (1982) (Brennan, J., respecting the denial of the petition for writ of certiorari), noting the possible use of Rule 60(b) under "unique" or "extraordinary" circumstances to vacate a judgment to permit reentry of a fresh judgment from which a timely appeal can be taken.

The respondent submits that Rule 4(a)(5), allowing an extension of time for filing a notice of appeal upon a showing of "excusable neglect or good cause", is the sole relief available to an appellant in a civil case for failing to meet the mandatory and jurisdictional requirement of a timely notice. However, should this Court find that additional relief should be available in truly extraordinary cases, the respondent suggests that Rule 60 may already provide such relief. The petitioner could have sought relief from the district court on the basis of his claimed

"unique" and "extraordinary" circumstances. The resolution of such an issue is more appropriate for a district court, which is capable of taking evidence and making findings of fact.[4] Appellate courts are ill-suited to the task of fashioning equitable relief upon facts not adequately developed below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

W. J. Michael Cody
Attorney General of Tennessee

Jerry L. Smith
Deputy Attorney General
Counsel of Record

Gordon W. Smith
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-6439
Attorneys for Respondent

[4]The petitioner contends for the first time in this Court that the notice of appeal may have arrived at the clerk's office prior to the date upon which it was filed and requests a remand on that issue. As with the other factual contentions of the petitioner, this claim could have been presented to the district court pursuant to Rule 60.

Supreme Court, U.S.
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NO. 87-5428

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

PRENTISS HOUSTON,

Petitioner,

v.

LARRY LACK, Warden, etc.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF SOUTH DAKOTA, ET AL.

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

CRAIG M. EICHSTADT
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501
(605) 773-3215
Counsel for Petitioners
For Additional Counsel
See Appendix

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42 pp

TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT

IN ABSENCE OF A TIMELY NOTICE OF APPEAL, OR AN EXTENSION OF THE TIME WITHIN WHICH TO FILE, THE COURT OF APPEALS LACKS JURISDICTION OVER PETITIONER'S APPEAL; IN ADDITION, NO EXCEPTION TO THE TIMELY FILING OF A NOTICE OF APPEAL HAS BEEN SHOWN TO EXIST IN THIS CASE. 10

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251 (1986) 4, 15, 28

Berman v. United States, 378 U.S. 530 (1964) 4, 15

Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257, reh'g. denied 434 U.S. 1089 (1978) PASSIM

Chandler v. Roudebush, 425 U.S. 840, n. 39 at 863 (1976) 22

Coopers and Lybrand v. Livesay, 437 U.S. 463, 472-475 (1978) 14

Evanston v. Gunn, 99 U.S. 660 (1879) 22

Fallen v. United States, 378 U.S. 139 (1964) PASSIM

Griggs v. Providence Consumer Discount Company, 459 U.S. 56 (1982) 4, 15, 28

Haines v. Kerner, 404 U.S. 519 (1971), reh'g denied, 405 U.S. 948 (1972) 31

Harris Truck Lines Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) PASSIM

Rose v. Lundy, 455 U.S. 509 (1982) 30

South Dakota v. Opperman, 428 U.S. 364 (1976) 29

State v. Opperman, 247 N.W.2d 673 (1976) 29

Stone v. Powell, 428 U.S. 465, n.31 491-492 (1976) 9, 29

Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964) 7, 14, 15

United States v. Robinson, 361 U.S. 220, 224 (1960) 3, 4, 11

United States v. Ross, 92 U.S. 281 (1876) 22

Ward v. Atlantic Coast Line R. Co., 265 F.2d 75 (5th Cir. 1959), rev'd on other grounds, 362 U.S. 396 (1960) 22

STATUTES:

28 U.S.C. § 1733 22

28 U.S.C. § 2107 PASSIM

28 U.S.C. § 2254 28, 29

S.D. Cod. L. Ann. § 15-26A-6 (1984) 2

S.D. Cod. L. Ann. § 23A-32-16 (Supp. 1987) 2

OTHER:

Federal Rules of Appellate Procedure Rules 3 and 4 PASSIM

Federal Rules of Appellate Procedure
Rule 22(b) 13, 28

Federal Rules of Appellate Procedure
Rule 26 12, 25

Federal Rules of Civil
Procedure Rule 60(b) 10, 32

Federal Rules of Evidence
Rules 301, 803(8) 22, 23

Bator, Finality and Criminal Law,
76 Harv. L. Rev. 441,
503-507 (1963) 30

NO. 87-5428

IN THE

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OCTOBER TERM, 1987

PRENTISS HOUSTON,

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LARRY LACK, Warden, etc.,

Respondents.

INTEREST OF THE AMICI CURIAE

Pursuant to Rule 36.4 of the Rules of this Court, the State of South Dakota and those States listed in the Appendix submit this brief as amici curiae in support of the Respondent, Larry Lack, Warden of the Middle Tennessee Reception Center. The amici States above-named believe firmly that habeas corpus litigation must have an end. All of these

States litigate habeas corpus petitions before the federal courts on a regular basis. They seek to make certain that once a denial of habeas corpus takes place, that the denial will be final unless the Petitioner appeals within the time as provided by Federal Rules of Appellate Procedure, Rules 3 and 4.

If these rules are not followed, this Court ordinarily holds that the matter may not be considered by the Court of Appeals unless very extraordinary circumstances exist. Where, as here, an opportunity existed to extend the time for filing of a notice of appeal, the States believe that it is not unfair to require the habeas petitioner to comply. Many states do not even provide, in the case of State habeas corpus or direct appeal, that the time for filing a notice of appeal may be extended. See e.g. S.D. Cod. L. Ann. §§ 15-26A-6 (1984) and 23A-32-16 (Supp. 1987). It has never

been thought that these provisions, or for that matter, those of Rules 3 and 4, are in any way violative of the rights of prisoners or other indigent persons. See United States v. Robinson, 361 U.S. 220, 224 (1960).

The States have a great interest in finality of litigation. They also have an interest in preventing prisoners in their institutions from claiming delivery of mail to institutional authorities when the mail has not arrived or has not been filed in the appropriate courts until after the requisite filing date. These States, therefore, respectfully request that this Court affirm the determination of the United States Court of Appeals for the Sixth Circuit.

SUMMARY OF ARGUMENT

Under Federal Rules of Appellate Procedure, Rules 3 and 4, and 28 U.S.C. § 2107, the United States Court of Appeals has no jurisdiction over a civil appeal

unless a notice of appeal is filed with the United States District Court within thirty days of entry of judgment. Although other defects may be waived, the failure to file a notice of appeal within thirty days renders the appeal invalid, and deprives the court of appeals of jurisdiction to hear it. F.R.A.P. Rule 3(a); 28 U.S.C. § 2107; Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251 (1986); Griggs v. Providence Consumer Discount Co., 459 U.S. 56 (1982); Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257; reh'g. denied 434 U.S. 1089 (1978).

This Court has been very firm in requiring filing of a notice of appeal as a prerequisite to appeals court jurisdiction. See cases cited above; See also Berman v. United States, 378 U.S. 530 (1964); United States v. Robinson, 361 U.S. 220 (1960). The reason for this rule was outlined in Browder,

434 U.S. at 264. The rule sets a definite point of time when litigation shall be at an end. This interest in finality is exactly that asserted by the State of Tennessee and the amici States in this case.

The amici States recognize that this Court has, from time to time, recognized exceptions to this rule. Although these exceptions tend to blur the bright line rule, the amici States do not request that this Court overrule the cases establishing these exceptions. They do argue that this case does not come within the recognized exceptions. See, e.g., Fallen v. United States, 378 U.S. 139 (1964). Appellant in this case did not do all that he could to give notice of appeal within the time allowed. He could have mailed the notice of appeal earlier. He could also have moved for an extension of time within which to file the notice of appeal. Factually, the record

shows that the notice of appeal arrived late because Petitioner mailed it to the wrong address. See Resp. Br. at n. 1, Statement of Case; Argument, II. B. The prison authorities mailed the letter the same day it was received. JA 28.

In addition, Fallen was a criminal case. The amici States argue that the civil statute, 28 U.S.C. § 2107, is not governed by Fallen.

The amici States also request that this Court not go behind the Clerk's file stamp. If a bright line rule is to be established and maintained, this Court should accept the clearly marked file stamps of the clerks of the various United States District Courts. It is also to be noted that Petitioner was given an opportunity to present arguments and facts showing incorrectness of the file stamp. No substantial doubt has been cast on the file stamp's accuracy. Petitioner also had counsel appointed before the court of

appeals. JA 29. In spite of this, the record shows that Petitioner gave the notice to prison authorities on January 27, 1986, and they mailed it on January 27, 1986. JA 28. It was received by the United States District Court for the Western District of Tennessee, Eastern Division, on February 7, 1986. Petitioner addressed the notice to the wrong court. JA 28. This showing falls short of showing any probability that the notice of appeal was received on a date earlier than the filing date.

Petitioner also fails to show "unique circumstances" in accord with the decision in Harris Truck Lines Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) and Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964). In these cases, the court found reasonable reliance upon explicit rulings or statements of the trial courts in granting extensions or ruling

on other motions. In the case at bar, however, Petitioner neither sought nor obtained a ruling that he had additional time within which to file his notice of appeal, nor did he ask for a new trial or hearing. The district court never considered that question, but proceeded with the normal processing of an appeal. The court of appeals did likewise until the lack of jurisdiction was called to its attention. It then asked Petitioner to explain the apparent lack of jurisdiction, JA 23-24. Petitioner then attempted to do so, JA 26-28, and the court of appeals appointed counsel to assist. JA 29.

The amici States also request that this Court not construe the notice of appeal as a motion to extend the time within which to file. Petitioner did not make a motion for such relief, which Rule 4(a)(5) specifically requires. Had Petitioner moved the district

court for additional time, he would have been within the rule. He did not do so, and thus is not entitled to an extension.

The States also submit that this Court should not cast about for a reason to validate the appeal in this case for policy reasons unique to the writ of habeas corpus. Although habeas corpus is, as Petitioner points out, the key to the prison door, it is also significantly intrusive into the workings of the state courts, and causes much friction in the relations between the national government and the states. See Stone v. Powell, 428 U.S. 465, n. 31 at 491-492 (1976). Certainly, where a single district judge, and on appeal, the courts of appeals, are permitted to overrule the judgments of state courts, the states and their courts are entitled to an interpretation of federal rules of finality

as favorable as that granted to private litigants.

In addition, this case might be a proper subject for relief under Fed. R. Civ. Pro. 60(b), relief from judgment. This rule is broad in its application, and is the preferred method for relief from judgment in a civil case. Other methods have been abolished, and Rule 60(b) is intended to cover the field. See Advisory Comm. Note, F.R.C.P. 60(b), 1946 Am. Where this avenue remains open to Petitioner, he should not be granted an exemption from normal jurisdictional rules.

ARGUMENT

IN ABSENCE OF A TIMELY NOTICE OF APPEAL, OR AN EXTENSION OF THE TIME WITHIN WHICH TO FILE, THE COURT OF APPEALS LACKS JURISDICTION OVER PETITIONER'S APPEAL; IN ADDITION, NO EXCEPTION TO THE TIMELY FILING OF A NOTICE OF APPEAL HAS BEEN SHOWN TO EXIST IN THIS CASE.

A. Timely filing of a notice of appeal is jurisdictional.

As Petitioner concedes in his brief, the timely filing of a notice of appeal is jurisdictional. In the absence of a timely filing, an appeal must be dismissed for want of jurisdiction. PET. BR. at 18, citing United States v. Robinson, 361 U.S. 220, 224 (1960). Federal Rules of Appellate Procedure, Rules 3, 4 and 26(b) reinforce this rule. Rule 3(a) provides that "failure of appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . . ." (Emphasis supplied.) Rule 4(a)(1) provides the time, thirty days, within which notice of appeal must be filed, except in cases involving the United States or an officer or agency thereof as a party. Rule 4(a)(5) provides that the district court upon a showing of excusable neglect or good cause may extend the time for filing a notice of appeal upon a motion filed within thirty days after the expiration of

the appeal time. Rule 26(b) prohibits the court of appeals from extending the time for filing a notice of appeal.

The 1979 amendments to Rule 4(a) provide that an additional ground, good cause, may be cited as a reason for extending the time for notice of appeal. Previously, excusable neglect, a higher standard, had been required. The 1979 amendment also clarified the time periods, and specifically required the filing of a motion to extend within thirty days. See Advisory Committee Note, 1979 Amendment, Rule 4(a)(5). The intent of the amendments was to clarify the rule and promote finality and certainty in application for extension and running of the appeal time. The amendment also makes it easier to gain an extension, while requiring a motion (rather than a "request") to obtain the extension. These amendments specifically negate Petitioner's argument that a late notice of

appeal should be construed as an application for additional time. When a document is to be construed as something other than what it purports to be, the rules specifically provide for this construction. See F.R.A.P. 22(b) (certificate of probable cause to appeal).

The amici States also contend that 28 U.S.C. § 2107 provides the outer limits within which an appeal may be taken, or within which an extension of time for filing a notice of appeal may be granted. The time limits in § 2107 are consistent with those in Rule 4. The fact that the Congress has, however, adopted a specific statutory time within which an appeal may be filed makes it much more difficult for Petitioner to argue that the time period may be disregarded. When this Court is interpreting a congressional enactment providing for jurisdiction of the court, it seeks out the

intent of Congress. Congressionally mandated jurisdictional limits may not be overcome by equitable arguments, even in situations that might call for such a result under a court rule. See Coopers and Lybrand v. Livesay, 437 U.S. 463, 472-475 (1978).

This Court, in interpreting the provisions of Rules 3 and 4, has held that they are "mandatory and jurisdictional." Browder v. Director, Illinois Department of Corrections, 434 U.S. 257, 264 (1978). This Court has occasionally found exceptions to strict compliance with Rules 3 and 4, see e.g. Fallen v. United States, 378 U.S. 139 (1964); Thompson v. Immigration and Naturalization Service, 375 U.S. 384 (1964). These exceptions have, however, always been strictly construed, and it is the rare case indeed in which this Court will permit a late filing to confer jurisdiction upon a court of appeals. See Browder, 434 U.S. at 264;

Griggs, 459 U.S. at 61; Berman v. United States, 378 U.S. 530 (1964). The requirement of filing a timely notice of appeal was applied to a habeas corpus case (albeit to the disadvantage of the State, not the petitioner) in Browder. The court required timely filing of the notice of appeal in two recent per curium opinions, even though an early notice of appeal had been filed, and it became ineffective due to the filing of other motions in the district court. Acosta v. Louisiana Department of Health and Human Services, 478 U.S. 251 (1986); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Fallen and Thompson have generally been restricted to their facts. In Fallen, the Court held that the petitioner did all that he could reasonably have been required to do by delivering a notice of appeal to his custodians within the time permitted. In Thompson, the petitioner reasonably relied on

direct statements of the district court to the effect that his motion extending the appeal time was filed on time. Exceptions to timely filing requirements have, ordinarily, been set forth in the rules and have not been constructed on a case-by-case basis. See F.R.A.P. 4(a)(2); 4(a)(5).

This Court in Browder set forth the reasoning behind requiring a notice of appeal for jurisdiction of the court of appeals. The other litigants are entitled to be free of the demands of the appellant unless the notice of appeal is filed on a timely basis. It is not difficult to file a notice of appeal within the time required. No particular technical forms are necessary, and a less than artfully drafted notice of appeal is sufficient. See JA at 21. In addition, not only may the notice of appeal be relatively informal, but the time for filing may be extended, if motion for extension is

made within the time permitted for appeal, plus thirty days. Since 1979, the appellant need not show excusable neglect, but only good cause. Filing of a notice of appeal within the time required thus is not onerous.

Given these minimal requirements, it is not unfair to prohibit an appellant from coming into court and claiming that he has delivered notice of appeal to prison authorities or to the post office for mailing, but that it did not arrive in time. This Court has routinely rejected such equitable pleas on the basis that filing is jurisdictional, and that the would be appellee has a right to finality once the appropriate period has run. If a factual inquiry can be made into each individual case, there would be no bright line rule and the interest of finality so carefully guarded by this Court and the Federal Rules of Appellate Procedure would be defeated. In

order to promote these goals, this Court should strictly adhere to the rules requiring either a notice of appeal within thirty days, or a motion to extend the time for filing within sixty days.

B. Application of Fallen to this case.

Petitioner's initial claim is that this case is governed by Fallen v. United States, 378 U.S. 139 (1964). Fallen held that strict compliance with the rule requiring filing of a notice of appeal in a criminal case within ten days would not be required where it "could not be fairly exacted." Initially, this holding would seem to conflict with the other, and more recent, holdings of this Court stating that the filing of the notice of appeal is "mandatory and jurisdictional." The amici States believe, however, that this Court would continue to apply the Fallen rule to those circumstances where no reasonable alternative existed for a criminal appellant

to the late filing of a notice of appeal. Contrary to the argument of appellant at pages 18-19 of his brief, Fallen does not signal a broad based exception to the normal jurisdictional requirements for courts of appeal. Rather, this Court will adhere to the rules where reasonable alternatives exist for a Petitioner.

In this case, compliance with the rule is not unreasonable for several reasons. First, the record shows that Petitioner sent the notice of appeal to the wrong court. JA 28; see Resp. Br. at n. 1, Statement of Case; Argument at II. B. Had he addressed it properly, it probably would have arrived on time. Second, the prison mail log shows that prison authorities sent the notice of appeal the same day it was presented to them. JA 28. Third, Petitioner had thirty days within which to file a notice of appeal. He did not mail the notice of appeal until some twenty-seven days after the judgment was

rendered. In Fallen, on the other hand, Petitioner had only ten days, and mailed the notice of appeal on the eighth day. In addition, Petitioner could have moved for additional time within which to file his notice of appeal under Rule 4, and the motion could have been heard ex parte if filed within thirty days. If filed outside thirty days, but within sixty days, the motion needed to be made upon reasonable notice to Respondent.

Unlike the petitioner in Fallen, who had only ten days, and who was paraplegic and ill, there is nothing in the record of this case that indicates the impossibility of filing the notice of appeal within the time required. Indeed, if Petitioner had addressed the envelope properly, his notice probably would have arrived on time. Although Petitioner cites absence of legal materials, transfer to a new facility, and a daily

regimen he was required to follow, none of these prevented him from mailing and addressing his envelope properly or sending it earlier than twenty-seven days after judgment.

In addition, as argued by Respondents, Fallen was a criminal case. It was not subject to the jurisdictional limits of 28 U.S.C. § 2107. This Court will not make exceptions to congressionally mandated jurisdictional limits. See supra at 13-14.

C. A factual evidentiary hearing is not required as to date of arrival of the notice of appeal.

At pages 25-29 of his brief, Petitioner argues that he should be granted an evidentiary hearing on the question of whether the notice of appeal arrived at the clerk's office prior to the date upon which it was filed. This Court should not permit such a hearing in this case for two reasons. First, in the absence of some unusual

circumstance indicating that the clerk's filing stamp is incorrect, a presumption of correctness exists. 28 U.S.C. § 1733; See Fed. R. Evid., Rules 301, 803(8); Chandler v. Roudebush, 425 U.S. 840, n. 39 at 863 (1976); Evanston v. Gunn, 99 U.S. 660 (1879); United States v. Ross, 92 U.S. 281 (1876). The purpose of having the clerk file stamp documents is to promote clarity and reduce any possible dispute about when a document was actually received. While the amici States concede that in unusual circumstances (such as Ward v. Atlantic Coast Line R. Co., 265 F.2d 75 (5th Cir. 1959), rev'd on other grounds, 362 U.S. 396 (1960), where a clerk's office was closed on normal business days), that an evidentiary hearing might be appropriate, the Petitioner has alleged no such circumstances in this case. If such unusual circumstances existed, they certainly could have been pointed out to the court of

appeals. Petitioner had counsel at the court of appeals level.

Second, the rule requires filing within thirty days. If the court makes a regular practice of going behind the file stamp, the purpose of promoting clarity and finality in litigation would be significantly eroded. Petitioner should be required, at a minimum, to make a showing that some unusual circumstance existed, such as closure of the clerk's office at the date when the notice of appeal should have been received. The fact that it took three or four days for the mail service to deliver the notice of appeal, plus speculation as to why other notices or briefs arrived at the time that they did, is simply insufficient to overcome the presumed correctness of the clerk's filing stamp. See Fed. R. Evid. Rules 301, 803(8).

D. The principals of Harris Trucklines Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) do not apply to this case.

Petitioner next contends that the case of Harris Trucklines Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) excuses his late notice of appeal, or should permit him to now ask for an extension of time. The circumstances in that case, however, are quite different from those here. Apparently, the trial judge in Harris specifically granted an extension of time within which to file a notice of appeal, where he did not have the power to do so. The Appellant then specifically relied upon this grant and failed to file notice of appeal within the original time, but did file within the extended time. In this case, Petitioner claims that since the appeal was processed in the normal fashion, and was not dismissed until after his time for requesting an extension had expired, that unique circumstances are present here.

Petitioner's argument is unsupportable for several reasons. First, Petitioner did not move that the time for filing a notice of appeal be extended, as required by the rules. Rule 4 makes such a motion jurisdictional. Second, Petitioner did not request relief under F.R.C.P. 60(b), even after the court of appeals requested that he explain his late filing, and even after counsel was appointed. The amici States recognize that the court of appeals could not have entertained such a motion. F.R.A.P. Rule 26(b). Petitioner did not, however, request any such relief from the district court.

Third, neither the district court nor the court of appeals ever told Petitioner that he had any longer period than thirty days within which to file his notice of appeal, as was the case in Harris. Rather, the courts and their clerks proceeded to process the appeal in the normal fashion

until such time as they noticed that the appeal had not been timely filed. Petitioner cannot rely on this processing of the appeal to the extent he would be entitled to rely on an explicit statement that he had additional time within which to file. His notice of appeal was late before his appeal was processed. Unlike the appellant in Harris, he cannot claim detrimental reliance on district court actions. Normal procedures of a clerk's office should not be held to create jurisdiction by estoppel.

E. Under the Rules of Appellate Procedure, a late filed notice of appeal should not be construed as a motion to extend the time for filing notice.

Petitioner cites several court of appeals cases, from before 1979, which construed late filed notices of appeal as requests for extension. Petitioner correctly points out that the courts of appeal have, for the most part, abandoned this practice

since 1979. The reason is clear. The 1979 amendment to Rule 4(a)(5) was adopted for the purpose of requiring that an application be made by motion. Merely filing a notice of appeal within the time for an extension is plainly insufficient under the rule. Only a tortured reading could permit a late filed notice of appeal to be construed as a motion for extension. This was not the case under the pre-1979 rule, cited at page 34 of Petitioner's brief. Only a "request for extension" was required. Under the present Rule 4, a "motion" is required. See Advisory Committee Note to 1979 Amendment to F.R.A.P., 4(a)(5). The clarity of this Rule promotes finality in litigation as well as a definite rule as to what must be done to obtain an extension. If this Court had intended that any notice of appeal filed within sixty days would be effective, the rule would have said so. Under its plain terms, nothing except a

motion to extend can be construed to fulfill the rule's requirements. Finally, where a notice of appeal is to have an effect beyond its normal function, the Federal Rules of Appellate Procedure specifically so provide. See F.R.A.P. 22(b) (Notice of appeal in 28 U.S.C. § 2254 case operates as a request for a certificate of probable cause to appeal.)

F. It is neither inequitable nor unfair to hold Petitioner to the requirements of the rule.

The amici States submit that it is neither unfair nor inequitable to hold habeas corpus petitioners, even those who are pro se, to the jurisdictional rules. They are not subject to exception outside the most unusual of circumstances. See Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251 (1986); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982); Browder v. Director, Illinois Department of Corrections, 434 U.S. 257

(1978). They are specifically applicable to habeas corpus cases. Browder. It is particularly appropriate, however, to apply rules designed to promote finality in cases under 28 U.S.C. § 2254.

The amici States have a strong interest in finality of their criminal judgments. Federal habeas corpus inevitably interferes with this interest. The State courts are bound by the United States Constitution and laws to the same degree as are the federal courts, and have granted, in some cases, greater protection to criminal defendants. Compare State v. Opperman, 247 N.W.2d 673 (1976) with South Dakota v. Opperman, 428 U.S. 364 (1976). See also Stone v. Powell, 428 U.S. 465, n. 31 at 491 (1976). Federal habeas corpus, however, arises only after the state's entire judicial system has considered the matter, and the petitioner has exhausted all remedies available to him in the state

courts. See Rose v. Lundy, 455 U.S. 509 (1982). The matter then is frequently reconsidered, either with or without an evidentiary hearing, by a single United States district judge, after which appeals may be had to the court of appeals. Frictions between federal habeas courts and state courts (which have already considered the same facts and points of law) are inevitable. Because of this natural friction, and because sensitive questions of federal/state relations frequently are raised by habeas corpus litigation, the States submit that they are entitled to at least as much consideration as are private litigants in the enforcement of procedural and jurisdictional rules of the federal courts. See Bator, Finality and Criminal Law, 76 Harv. L. Rev., 441, 503-507 (1963).

Petitioner would seek to have his status as prisoner grant him privileges that were

not granted to the state by this Court Browder, supra, and have not been accorded to private litigants. To some extent, the courts have indulged the pro se prisoner litigant, in order to assure access to a remedy. See Haines v. Kerner, 404 U.S. 519 (1971) reh'g denied, 405 U.S. 948 (1972). There should be, however, limits to the special privileges that pro se status confers and one of these is certainly that no relief can be granted by an appeals court without jurisdiction to hear the prisoner's case. The purpose behind the liberal construction rules of Haines is to give pro se litigants equal access; it is not meant to provide them with unfair advantages. A pro se prisoner should not be permitted to use that status to essentially confer jurisdiction where none exists.

The amici States would also point out that it is not inherently unfair to enforce the appellate rules in this case. The

district court would have jurisdiction to consider a Rule 60(b) motion for relief from the judgment, as Respondent argues. The judgment could be modified (in this case by vacation and reentry) if Petitioner can show excusable neglect or a number of other causes for its modification, F.R.C.P. 60(b). According to the Advisory Committee Notes, 1946 Amendment to Rule 60(b), this rule was intended to cover the field of relief from judgment. It is the preferred method for relief from the effects of a judgment. This rule remains open to Petitioner at this time. Certainly, where the Petitioner has an additional avenue to pursue, he has even less grounds for requesting an exception to the jurisdictional rules of F.R.A.P. 3 and 4. In light of the fact that exceptions to the jurisdictional requirement of the timely filing of notice of appeal are rare indeed, Petitioner's alternate remedy renders his

situation even less exceptional than it would otherwise be.

CONCLUSION

The amici States hereby request that this Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Dated this 1st day of April, 1988.

Respectfully submitted,

Roger A. Tellinghuisen

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
Counsel of Record

Craig M. Eichstadt

CRAIG M. EICHSTADT
Assistant Attorney General
Office of the Attorney General
State Capitol
Pierre, South Dakota 57501-5090
(605) 773-3215

APPENDIX

APPENDIX

Listing of Additional Counsel

Honorable John Van de Kamp
Attorney General of California
800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, California 90010

Honorable Robert Butterworth
Attorney General of Florida
State Capitol
Tallahassee, Florida 32399-1050

Honorable Jim Jones
Attorney General of Idaho
State Capitol
Boise, Idaho 83720

Honorable Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

Honorable Robert T. Stephan
Attorney General of Kansas
Judicial Center - Second Floor
Topeka, Kansas 66612

Honorable Michael C. Moore
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

Honorable William L. Webster
Attorney General of Missouri
Supreme Court Building, 101 High Street
Jefferson City, Missouri 65102

Honorable Mike Greely
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620

Honorable Robert M. Spire
Attorney General of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509

Honorable Stephen E. Merrill
Attorney General of New Hampshire
108 State House Annex
Concord, New Hampshire 03301

Honorable W. Cary Edwards
Attorney General of New Jersey
Richard J. Hughes Justice Complex, CN080
Trenton, New Jersey 08625

Honorable Lacy H. Thornburg
Attorney General of North Carolina
Department of Justice
2 East Morgan Street
Raleigh, North Carolina 27602

Honorable Robert Henry
Attorney General of Oklahoma
112 State capitol
Oklahoma City, Oklahoma 73105

Honorable Travis Medlock
Attorney General of South Carolina
Rembert Dennis Office Building
1000 Assembly Street
Columbia, South Carolina 29211

Honorable Mary Sue Terry
Attorney General of Virginia
101 N. 8th Street - 5th Floor
Richmond, Virginia 23219

Honorable Jospeh B. Meyer
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

Honorable Dave Frohnmayer
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310